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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1934

## No. 340

OLD COMPANY'S LEHIGH, INC., PETITIONER,

*vs.*

HENRY E. MEEKER, AS RECEIVER FOR THE FIRST NATIONAL BANK IN MAMARONECK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

**PETITION FOR CERTIORARI FILED SEPTEMBER 1, 1934.**

**CERTIORARI GRANTED OCTOBER 8, 1934.**

# SUPREME COURT OF THE UNITED STATES

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[fols. a & 1]

## IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

OLD COMPANY'S LEHIGH, INC., Plaintiff,

against

HENRY E. MEEKER, as Receiver for The First National Bank in Mamaroneck; The First National Bank in Mamaroneck and R. G. Brewer, Inc., Defendants

BILL OF COMPLAIT

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The above named plaintiff, for its bill of complaint herein, alleges:

For a First Cause of Action

First: That the plaintiff is a corporation, duly organized and existing under and by virtue of the laws of the State of New Jersey, with its principal place of business in the City of Philadelphia, State of Pennsylvania, where it is duly licensed to do business.

Second: That upon information and belief, the defendant, R. G. Brewer, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of [fol. 2] New York, with its principal place of business in the City of Mamaroneck, in the State of New York, in the Southern District of New York.

Third: That the defendant, The First National Bank in Mamaroneck is a National Bank organized and operating under the National Banking Laws, which said bank suspended business on the 16th day of January, 1933, on account of insolvency, and in due course, a Receiver was appointed by the Comptroller of the Currency, qualified, and took charge of the assets of the said bank, said Receiver being the defendant, Henry E. Meeker, who now is in charge of the assets of said bank.

Fourth: That the grounds upon which this Court's jurisdiction depends, are that this is a suit arising under the

laws of the United States, in which the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars, and this suit is also a case for winding up the affairs of a National Banking Institution, and upon the further ground that the plaintiff is a citizen of the State of New Jersey, and the defendant, R. G. Brewer, Inc., is a citizen of the State of New York, and the controversy between the said plaintiff and the above mentioned defendant, R. G. Brewer, Inc., exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars.

Fifth: That on the 12th day of January, 1933, the plaintiff deposited for collection with the Central Penn National Bank of Philadelphia, a note, made by the defend- [fol. 3] ant, R. G. Brewer, Inc.,to the order of the plaintiff, in the sum of Three Thousand ($3,000.00) Dollars, which note became due and payable on the 16th day of January, 1933, at the offices of the defendant, The First National Bank in Mamaroneck.

Sixth: That upon information and belief, the said Central Penn National Bank of Philadelphia forwarded the above mentioned note for collection through the Chase National Bank of New York and the Federal Reserve Bank of New York, to the defendant, The First National Bank in Mamaroneck.

Seventh: That upon information and belief, on the 14th day of January, 1933, the defendant, R. G. Brewer, Inc., tendered its check, in the sum of Three Thousand Fifteen ($3,015.00) Dollars, to the defendant, The First National Bank in Mamaroneck, and the said The First National Bank in Mamaroneck accepted this check and delivered to the defendant, R. G. Brewer, Inc., the above mentioned note, made by the defendant, R. G. Brewer, Inc., to the order of the plaintiff.

Eighth: That the said check, tendered by the defendant, R. G. Brewer, Inc., was drawn upon the funds the said R. G. Brewer, Inc., had on deposit with the defendant, The First National Bank in Mamaroneck.

Ninth: That on the 16th day of January, 1933, the defendant, The First National Bank in Mamaroneck, did not resume business because of insolvency, and in due course,

[fol. 4] the defendant, Henry E. Meeker, was appointed Receiver for said bank by the Comptroller of the Currency.

Tenth: That subsequently thereto, and namely, on the 9th day of June, 1933, the plaintiff filed with the defendant, Henry E. Meeker, a claim in the sum of Three Thousand Fifteen ($3,015.00) Dollars, alleging that such claim is a preferred one and that a trust existed in favor of the plaintiff as against the defendant, The First National Bank in Mamaroneck, and the said defendant, Henry E. Meeker, rejected the said claim.

Eleventh: That the plaintiff does not have an adequate remedy at law.

For a Second Cause of Action

Twelfth: That the plaintiff repeats, reiterates and realleges each and every allegation of its complaint herein contained, marked paragraphs, "First", "Second", "Third", "Fourth", "Fifth" and "Sixth", with the same force and effect as if the same were herein set forth at length.

Thirteenth: Upon information and belief that on the 14th day of January, 1933 the defendant, The First National Bank in Mamaroneck, was wholly insolvent, and the said defendant and the defendant, R. G. Brewer, Inc., well knew of the said insolvency.

Fourteenth: Upon information and belief that the defendant, The First National Bank in Mamaroneck, and the [fol. 5] defendant, R. G. Brewer, Inc., conspired together and formed the deliberate design and purpose of defrauding the plaintiff and of discharging the liability of the defendant, R. G. Brewer, Inc., to pay the note, made by the said defendant, R. G. Brewer, Inc., to the order of the plaintiff, in the sum of Three Thousand ($3,000.00) Dollars, which note became due on the 16th of January, 1933.

Fifteenth: Upon information and belief, that in furtherance of this conspiracy and plan, the defendant, R. G. Brewer, Inc., executed and delivered a check, in the sum of Three Thousand Fifteen ($3,015.00) Dollars, payable out of the funds the said defendant, R. G. Brewer, Inc., had on deposit with the defendant, The First National Bank in

Mamaroneck, and the said defendant, The First National Bank in Mamaroneck, received and accepted said check, and surrendered the above mentioned note to the defendant, R. G. Brewer, Inc.

Sixteenth: Upon information and belief, that the defendant, R. G. Brewer, Inc., delivered the above mentioned check to the defendant, The First National Bank in Mamaroneck, on the 14th day of January, 1933, and the defendant, The First National Bank in Mamaroneck, surrendered the above mentioned note to the defendant, R. G. Brewer, Inc., on the same date, before the maturity of the said note.

Seventeenth: Upon information and belief, that the defendants, R. G. Brewer, Inc., and The First National Bank in Mamaroneck, knew that the said defendant, The First [fol. 6] National Bank in Mamaroneck, would not resume business on the next business day, and that in fact, the said defendant, The First National Bank in Mamaroneck, did not resume business on the next regular business day, that is on January 16th, 1933.

Eighteenth: That as a result of the said conspiracy, and the failure of the defendant, The First National Bank in Mamaroneck, to resume business on the 16th day of January, 1933, the plaintiff did not receive the principal of the check, drawn by the defendant, R. G. Brewer, Inc., upon the funds it had on deposit with the defendant, The First National Bank in Mamaroneck.

Nineteenth: That by reason of the premises, the plaintiff has suffered damages in the sum of Three Thousand Fifteen ($3,015.00) Dollars.

Twentieth: That the plaintiff does not have an adequate remedy at law.

For a Third Cause of Action

Twenty-first: That the plaintiff repeats, reiterates and realleges each and every allegation of its complaint herein contained, marked paragraphs, "First", "Second", "Third", "Fourth", "Fifth", "Sixth", "Seventh", "Eighth" and "Ninth", inclusive, with the same force and effect as if the same were herein set forth at length.

Twenty-second: Upon information and belief, that the defendants, Henry E. Meeker and The First National Bank

[fol. 7] in Mamaroneck, now have in their possession the said check drawn by the defendant, R. G. Brewer, Inc., on the 14th day of June, 1933, in the sum of Three Thousand Fifteen ($3,015.00) Dollars, to the order of the defendant, The First National Bank in Mamaroneck.

Twenty-third: That the plaintiff has demanded that the defendants, Henry E. Meeker and The First National Bank in Mamaroneck, assign and deliver the said check to the plaintiff, and the plaintiff demands now that the said defendants, Henry E. Meeker and The First National Bank in Mamaroneck, deliver and assign the said check to it, but the said defendants, Henry E. Meeker and The First National Bank in Mamaroneck, have refused and still refuse to make said assignment and delivery.

Twenty-fourth: That the plaintiff does not have an adequate remedy at law.

Wherefore, the plaintiff prays for equitable relief as follows:

1. That a writ of subpoena may be granted to the plaintiff to be directed to the defendants to wit, Henry E. Meeker, as Receiver for The First National Bank in Mamaroneck, The First National Bank in Mamaroneck and R. G. Brewer, Inc., thereby requiring the said defendants personally to appear on a certain day, before the Court, and then and there, full, true, direct and perfect answers make, to all and singular the premises, and further to per-
[fol. 8] form and abide by such further order, direction or decree therefor as to the Court may seem meet.

2. That the plaintiff be adjudged and decreed to be entitled to establish, and do have established, the full amount of this claim, to wit, in the sum of Three Thousand Fifteen ($3,015.00) Dollars, with interest thereon at six (6%) per cent. per annum, from said 16th day of January, 1933, and the said defendant, Henry E. Meeker, as Receiver for The First National Bank in Mamaroneck, be directed to pay the full amount thereof out of any funds in his hands prior to any payments or further payments to the general creditors of said bank,

Or in the Alternative

3. That the plaintiff be adjudged and decreed to be the owner of the check drawn by the defendant, R. G. Brewer, Inc., on the 14th day of January, 1933, in the sum of Three Thousand Fifteen ($3,015.00) Dollars, to the order of the defendant, The First National Bank in Mamaroneck, and that the defendants, Henry E. Meeker, as Receiver for The First National Bank in Mamaroneck, and the First National Bank in Mamaroneck, be directed to assign and deliver the said check to the plaintiff.

4. That the defendant, R. G. Brewer, Inc., be ordered and decreed to pay the plaintiff the sum of Three Thousand Fifteen ($3,015.00) Dollars in full payment for the principal of the said check, together with interest at the rate of six (6%) per cent. per annum, from the 16th day of January, 1933.

[fol. 9] 5. That the plaintiff have such other and further relief as the Court may deem proper and equitable.

Israel H. Mandel, Attorney for Plaintiff, Office and P. O. Address: 191 Joralemon Street, Borough of Brooklyn, City and State of New York.

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In United States District Court, Southern District of New York

[Title omitted]

Notice of Motion to Dismiss Bill of Complaint

Sir: Please take notice that upon the complaint herein, the defendant, Hiram E. Meeker, as receiver of the First National Bank in Mamaroneck, sued herein as Henry E. Meeker, as receiver for the First National Bank in Mamaro-
[fol. 10] neck, will move this court at a term thereof to be held at the United States Court and Postoffice Building, in the Borough of Manhattan, City of New York, on the 11th day of July, 1933, at 10:30 o'clock in the forenoon of that day, for an order dismissing the complaint herein as to said defendant, upon the ground that said complaint and each and every cause of action therein set forth fails upon

the face thereof to set forth facts sufficient to constitute a cause of action in equity.

Dated White Plains, New York, June 30, 1933.

Yours, etc., Lynch, Cahn & Weed, Attorneys for Defendant, Meeker, Office & P. O. Address: Bar Building, White Plains, New York.

To Israel H. Mandel, Esq., Attorney for Plaintiff, 191 Joralemon Street, Brooklyn, New York.

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[fol. 11] In United States Dissrict Court, Southern District of New York

E. 76-139

Old Company's Lehigh, Inc., Plaintiff,

against

Henry E. Meeker, as Receiver for The First National Bank in Mamaroneck; The First National Bank in Mamaroneck and R. G. Brewer, Inc., Defendants.

Opinion, Coxe, D. J.

The complaint in this action alleges that the Brewer Check for $3,015. was drawn against funds in the Mamaroneck Bank and that the check was accepted; and, further, that the $3,000. note was thereupon delivered to the Brewer Company. There was, therefore, no trust under Federal law which entitled the plaintiff to preferential treatment in the liquidation of the Bank. The provisions of the New York Negotiable Instruments Law are not applicable as the National Banking Act alone regulates the distribution of assets of insolvent national banks; and the Federal Statutory law in that respect is supreme. I think, therefore, that the first cause of action is plainly insufficient. The second cause of action is predicated on fraud; and fraud does not entitle the plaintiff to priority in payment from the Bank's assets and delivery to the plaintiff of the Brewer checks, as prayed for in the third cause of action, and will avail the plaintiff nothing, as the check was honored and

[fol. 12] paid by the bank, and delivery to the plaintiff at this time will add nothing to the plaintiff's claim.

The motion to dismiss as to the defendant Meeker is granted.

August 3, 1933.

Coxe, U. S. D. J.

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In United States District Court

[Title omitted]

Order on Motion to Dismiss—August 22, 1933

A motion having been made herein by defendant Meeker, as receiver, for an order dismissing the complaint herein [fol. 13] as to him for failure to state a cause of action in equity, and said motion having duly come on to be heard on the 1st day of August, 1933.

Now, upon reading and filing the said notice of motion dated June 30, 1933, and upon the complaint herein, and after hearing Monroe J. Cahn, Esq., of counsel for the defendant, Meeker, in support of said motion, and Israel H. Mandel, Esq., attorney for the plaintiff, in opposition thereto, and due deliberation having been had thereon, and upon filing the opinion of the court herein, upon motion of Lynch, Cahn & Weed, attorneys for the defendant, Meeker, it is

Ordered, that the said motion be and the same hereby is granted; and it is

Further ordered, that the complaint herein be and the same hereby is dismissed as against the defendant, Meeker, as receiver of The First National Bank of Mamaroneck; and it is

Further ordered, that the plaintiff herein may serve an amended complaint within ten days from the date of the entry of this order and the service of a copy thereof.

Alfred C. Coxe, United States District Judge.

[fol. 14] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AMENDED BILL OF COMPLAINT

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The above named plaintiff, for its amended bill of complaint herein, alleges:

For a First Cause of Action

First: That the plaintiff is a corporation, duly organized and existing under and by virtue of the laws of the State of New Jersey, with its principal place of business in the City of Philadelphia, State of Pennsylvania, where it is duly licensed to do business.

Second: That upon information and belief, the defendant, R. G. Brewer, Inc., is a corporation duly organized and ex-
[fol. 15] isting under and by virtue of the laws of the State of New York, with its principal place of business in the City of Mamaroneck, in the State of New York, in the Southern District of New York.

Third: That the defendant, The First National Bank in Mamaroneck is a National Bank organized and operating under the National Banking Laws, which said bank suspended business on the 16th day of January, 1933, on account of insolvency, and in due course, a Receiver was appointed by the Comptroller of the Currency, qualified, and took charge of the assets of the said bank, said Receiver being the defendant, Henry E. Meeker, who now is in charge of the assets of said bank.

Fourth: That the grounds upon which this Court's jurisdiction depends, are that this is a suit arising under the laws of the United States, in which the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars, and this suit is also a case for winding up the affairs of a National Banking Institution, and upon the further ground that the plaintiff is a citizen of the State of New Jersey, and the defendant,

R. G. Brewer, Inc., is a citizen of the State of New York, and the controversy between the said plaintiff and the above mentioned defendant, R. G. Brewer, Inc., exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars.

Fifth: That on the 12th day of January, 1933, the plaintiff deposited for collection with the Central Penn National Bank of Philadelphia, a note, made by the defendant, R. G. [fol. 16] Brewer, Inc., to the order of the plaintiff, in the sum of Three Thousand ($3,000.00) Dollars, which note became due and payable on the 16th day of January, 1933, at the office of the defendant, The First National Bank in Mamaroneck.

Sixth: That upon information and belief, the said Central Penn National Bank of Philadelphia forwarded the above mentioned note for collection through the Chase National Bank of New York and the Federal Reserve Bank of New York, to the defendant, The First National Bank in Mamaroneck.

Seventh: That the plaintiff in depositing said note for collection, as alleged in paragraph, "Fifth" hereof, and the defendant, The First National Bank in Mamaroneck, in accepting said note for collection, as alleged in paragraph, "Sixth" hereof, entered into these contractual obligations with full knowledge, and with the intent that Article 19-A of the Negotiable Instruments Law of the State of New York should govern the relationship and the obligations of the parties, and plaintiff respectfully requests the Court to take judicial notice of the provisions of Article 19-A of the Negotiable Instruments Law of the State of New York, with the same force and effect as if the same were set forth at length herein.

Eighth: Upon information and belief, that on the 14th day of January, 1933, the defendant, R. G. Brewer, Inc., tendered its check in the sum of Three Thousand Fifteen ($3,015.00) Dollars to the defendant, The First National Bank in Mamaroneck, and that the said defendant, The [fol. 17] First National Bank in Mamaroneck, accepted said check and delivered to the defendant, R. G. Brewer, Inc., the above mentioned note made by the defendant, R. G. Brewer, Inc., to the order of the plaintiff.

Ninth: That the said check, tendered by the defendant, R. G. Brewer, Inc., was drawn upon the funds the said R. G. Brewer, Inc., had on deposit with the defendant, The First National Bank in Mamaroneck.

Tenth: That on the 16th day of January, 1933, the defendant, The First National Bank in Mamaroneck, did not resume business because of insolvency, and in due course, the defendant, Henry E. Meeker, was appointed Receiver for said bank by the Comptroller of the Currency.

Eleventh: That subsequently thereto, and namely, on the 9th day of June, 1933, the plaintiff filed with the defendant, Henry E. Meeker, a claim in the sum of Three Thousand Fifteen ($3,015.00) Dollars, alleging that such claim is a preferred one and that a trust existed in favor of the plaintiff as against the defendant, The First National Bank in Mamaroneck, and the said defendant, Henry E. Meeker, rejected the said claim.

Twelfth: That the plaintiff does not have an adequate remedy at law.

For a Second Cause of Action

Thirteenth: That the plaintiff repeats, reiterates and realleges each and every allegation of its amended complaint [fol. 18] herein contained, marked paragraphs, "First," "Second," "Third," "Fourth," "Fifth," "Sixth," "Seventh," "Eighth," "Ninth," "Tenth," "Eleventh," and "Twelfth," with the same force and effect as if the same were herein set forth at length.

Fourteenth: Upon information and belief, that on the 14th day of January, 1933, the defendant, The First National Bank in Mamaroneck, was wholly insolvent, and the said defendant and the defendant, R. G. Brewer, Inc., well knew of the said insolvency.

Fifteenth: Upon information and belief, that R. G. Brewer, the treasurer of the defendant, R. G. Brewer, Inc., who handled the transaction on behalf of the said defendant, R. G. Brewer, Inc., as alleged in this complaint, was also a director and managing officer of the defendant, The First National Bank in Mamaroneck, and was familiar with all the details as to its insolvency and imminent receivership.

Sixteenth: That the defendant, The First National Bank in Mamaroneck, acted without the scope of its authority as agent for the collection of the note of the plaintiff which became due and payable on the 16th day of January, 1933, in releasing said note to the defendant, R. G. Brewer, Inc., on the 14th day of January, 1933, two days prior to the date of the maturity of said note, and in accepting payment in another medium than cash.

Seventeenth: Upon information and belief, that the defendant, The First National Bank in Mamaroneck, and the defendant, R. G. Brewer, Inc., conspired together and [fol. 19] formed the deliberate design and purpose of defrauding the plaintiff and of discharging the liability of the defendant, R. G. Brewer, Inc., on the note, to the order of the plaintiff, in the sum of Three Thousand ($3,000.00) Dollars, which note became due on the 16th day of January, 1933.

Eighteenth: Upon information and belief, that in furtherance of this conspiracy and plan, the defendant, R. G. Brewer, Inc., executed and delivered a check, in the sum of Three Thousand Fifteen ($3,015.00) Dollars, payable out of the funds the said defendant, R. G. Brewer, Inc., had on deposit with the defendant, The First National Bank in Mamaroneck, and the said defendant, The First National Bank in Mamaroneck, received and accepted said check, and surrendered the above mentioned note to the defendant, R. G. Brwer, Inc.

Nineteenth: Upon information and belief, that the defendant, R. G. Brewer, Inc., and The First National Bank in Mamaroneck, knew that the said defendant, The First National Bank in Mamaroneck, would not resume business on the next business day, and that in fact, the said defendant, The First National Bank in Mamaroneck, did not resume business on the next regular business day, that is, on January 16th, 1933.

Twentieth: Upon information and belief, that on January 14th, 1933, at the time the defendant, The First National Bank in Mamaroneck, accepted the check of the defendant, [fol. 20] R. G. Brewer, Inc., and surrendered the note, as aforestated, the said defendant, R. G. Brewer, Inc., had on deposit with the said bank ample funds to cover the amount

due on the note, namely, the sum of Three Thousand Fifteen ($3,015.00) Dollars.

Twenty-first: That by the acceptance of the said check drawn by the defendant, R. G. Brewer, Inc., and made payable to the order of the defendant, The First National Bank in Mamaroneck, the sum of Three Thousand Fifteen ($3,015.00) Dollars was immediately charged against the account of the defendant, R. G. Brewer, Inc., and became a special trust fund in the possession of the defendant, The First National Bank in Mamaroneck, to be remitted in payment of the aforementioned note of the plaintiff.

Twenty-second: That as a result of the said conspiracy, and the failure of the defendant, The First National Bank in Mamaroneck, to resume business on the 16th day of January, 1933, the plaintiff did not receive the principal of the check, drawn by the defendant, R. G. Brewer, Inc., upon the funds it had on deposit with the defendant, The First National Bank in Mamaroneck.

Twenty-third: That by reason of the premises, the plaintiff has suffered damages in the sum of Three Thousand Fifteen ($3,015.00) Dollars.

Twenty-fourth: That the plaintiff does not have an adequate remedy at law.

[fol. 21] For a Third Cause of Action

Twenty-fifth: That the plaintiff repeats, reiterates and realleges each and every allegation of its amended complaint herein contained, marked paragraphs, "First", "Second", "Third", "Fourth", "Fifth", "Sixth", "Seventh", 'Eighth", "Ninth,", "Tenth", "Eleventh", "Twelfth", "Thirteenth", "Fourteenth", "Fifteenth", "Sixteenth", "Seventeenth", "Eighteenth", "Nineteenth", "Twentieth", "Twenty-first", "Twenty-second,", "Twenty-third", and "Twenty-fourth," with the same force and effect as if the same were herein set forth at length.

Twenty-sixth: Upon information and belief, that the defendants, Henry E. Meeker and The First National Bank in Mamaroneck, now have in their possession the said check drawn by the defendant, R. G. Brewer, Inc., on the 14th

day of June, 1933, in the sum of Three Thousand Fifteen ($3,015.00) Dollars, to the order of the defendant, The First National Bank in Mamaroneck.

Twenty-seventh: Upon information and belief, that the defendant, The First National Bank in Mamaroneck, accepted from the defendant, R. G. Brewer, Inc., the aforestated check in the sum of Three Thousand Fifteen ($3,015.00) Dollars, on the 14th day of January, 1933, after banking hours.

Twenty-eighth: Upon information and belief, that the defendant, The First National Bank in Mamaroneck, did not [fol. 22] charge the said check of Three Thousand Fifteen ($3,015) Dollars against the account of the defendant, R. G. Brewer, Inc., and that the said check of Three Thousand Fifteen ($3,015.00) Dollars is still in the possession of the defendant, Henry E. Meeker, the Receiver of said bank, unpaid and not charged against the account of the drawer of said check.

Twenty-ninth: That the defendant, The First National Bank in Mamaroneck, exceeded its authority as agent for collection of the note hereinbefore mentioned, in surrendering said note without receiving in cash the amount due on said note, and further in surrendering said note two days before the date of its maturity, and that the said check of Three Thousand Fifteen ($3,015.00) Dollars constitutes a negotiable instrument, the proceeds of the wrongdoing of the agent bank, the defendant, The First National Bank in Mamaroneck, which negotiable instruments has not yet been discharged and cancelled by payment, and the possession and ownership thereof rightfully belongs to the plaintiff.

Thirtieth: That the plaintiff has demanded that the defendants, Henry E. Meeker and The First National Bank in Mamaroneck, assign and deliver the said check to the plaintiff, and the plaintiff demands now that the said defendants, Henry E. Meeker, and The First National Bank in Mamaroneck, deliver and assign the said check to it, but the said defendants, Henry E. Meeker and The First National Bank in Mamaroneck, have refused and still refuse to make said assignment and delivery.

[fol. 23] Thirty-first: That the plaintiff does not have an adequate remedy at law.

Wherefore, the plaintiff prays for equitable relief as follows:

1. That a writ of subpoena may be granted to the plaintiff to be directed to the defendants to wit, Henry E. Meeker, as Receiver for the First National Bank in Mamaroneck, The First National Bank in Mamaroneck and R. G. Brewer, Inc., thereby requiring the said defendants personally to appear on a certain day, before the Court, and then and there, full, true, direct and perfect answers make, to all and singular the premises, and further to perform and abide by such further order, direction or decree therefore as to the Court may seem meet.

2. That the plaintiff be adjudged and decreed to be entitled to establish, and do have established, the full amount of this claim to wit, in the sum of Three Thousand Fifteen ($3,015.00) Dollars, with interest thereon at six (6%) per cent. per annum, from said 16th day of January, 1933, and the said defendant, Henry E. Meeker, as Receiver for The First National Bank in Mamaroneck, be directed to pay the full amount thereof out of any funds in his hands prior to any payments or further payments to the general creditors of said bank.

Or in the Alternative

3. That the plaintiff be adjudged and decreed to be the owned of the check drawn by the defendant, R. G. Brewer, Inc., on the 14th day of January, 1933, in the sum of Three [fols. 24 & 25] Thousand Fifteen ($3,015.00) Dollars to the order of the defendant, The First National Bank in Mamaroneck and that the defendants Henry E. Meeker, as Receiver for The First National Bank in Mamaroneck, and The First National Bank in Mamaroneck, be directed to assign and deliver the said check to the plaintiff.

4. That the defendant, R. G. Brewer, Inc., be ordered and decreed to pay the plaintiff the sum of Three Thousand Fifteen ($3,015.00) Dollars in full payment of the principal of the said check, together with interest at the rate of six (6%) per cent. per annum, from the 16th day of January, 1933.

5. That the plaintiff have such other and further relief as the Court may deem proper and equitable.

Israel H. Mandel, Attorney for Plaintiff, Office and P. O. Address: 191 Joralemon Street, Borough of Brooklyn, City and State of New York.

*Duly sworn to by H. H. Pease. Jurat omitted in printing.*

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[fol. 26] In United States District Court, Southern District of New York

[Title omitted]

Notice of Motion to Dismiss Amended Bill of Complaint

Sir: Please take notice that upon the amended complaint herein, the defendant, Hiram E. Meeker, as receiver of First National Bank in Mamaroneck, sued herein as Henry E. Meeker, as receiver for the First National Bank in Mamaroneck, will move this court at a term thereof to be held at the United States Court and Postoffice Building, in the Borough of Manhattan, City of New York, on the 26th day of September, 1933, at 10:30 o'clock in the forenoon of that day, for an order dismissing the complaint herein as to said defendant, upon the ground that said amended complaint and each and every cause of action therein set forth fails upon the face thereof to set forth facts sufficient to [fol. 27] constitute a cause of action in equity.

Dated, White Plains, New York, September 18th, 1933.

Yours, etc., Lynch, Calm & Weed, Attorneys for Defendant, Meeker, Office & P. O. Address: Bar Building, White Plains, N. Y.

To: Israel H. Mandel, Esq., Attorney for Plaintiff, 191 Joralemon Street, Brooklyn, N. Y.

[fol. 28] In United States District Court, Southern District of New York

E. 76-139

Old Company's Lehigh, Inc., Plaintiff,

against

Henry E. Meeker, as Receiver for The First National Bank in Mamaroneck; The First National Bank in Mamaroneck and R. G. Brewer, Inc., Defendants

Opinion, Coleman, D. J.

Motion to dismiss the complaint must be granted because of Judge Coxe's decision on the previous motion. The new allegations do not change the situation from what Judge Coxe passed on. They are merely allegations of conclusions of law or of immaterial details under Judge Coxe's rulings.

September 26, 1933.

F. J. C., U. S. D. J.

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[fol. 29] In United States District Court

[Title omitted]

Order of Dismissal—October 6, 1933

A motion having been made herein by the defendant Meeker, as receiver for an order dismissing the amended complaint herein as to him for failure to state a cause of action in equity, and said motion having duly come on to be heard on the 26th day of September, 1933,

Now, upon reading and filing the said notice of motion dated September 18, 1933, and upon the amended complaint herein, and after hearing Alfred S. Schechter, Esq., of counsel for the defendant Meeker, in support of said motion, and Israel H. Mandel, Esq., attorney for the plaintiff, in opposition thereto, and due deliberation having been had thereon, and upon filing the opinion of the court herein, upon motion of Lynch, Cahn & Weed, attorneys for the de-

[fol. 30] fendant Meeker, it is

Ordered, that the said motion be, and the same hereby is, granted in all respects; and it is further

Ordered, that the amended complaint herein be and the same hereby is dismissed as against the defendant Meeker, as receiver of the First National Bank in Mamaroneck.

Frank J. Coleman, United States District Judge.

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In United States District Court, Southern District of New York

E. 76-139

Old Company's Lehigh, Inc., Plaintiff,

against

Henry E. Meeker, as Receiver for The First National Bank in Mamaroneck; The First National Bank in Mamaroneck and R. G. Brewer, Inc., Defendants

Judgment

A motion made herein by the defendant, Meeker, as Receiver for the First National Bank in Mamaroneck, for an order dismissing the amended complaint herein as to him for failure to state a cause of action in equity, having been duly granted by an order made and entered herein on the 9th day of October, 1933.

[fol. 31] Now, on motion of Lynch, Cahn & Weed, attorneys for the defendant, Meeker,

It is adjudged, that the plaintiff's amended complaint be, and the same hereby is, dismissed as to the defendant, Henry E. Meeker, as Receiver for the First National Bank of Mamaroneck, and that the defendant, Henry E. Meeker, as Receiver for the First National Bank of Mamaroneck, recover of the plaintiff, Old Company's Lehigh, Inc., the sum of $27.00 costs as taxed, and have execution therefor.

Dated New York, N. Y., October 24th, 1933.

Charles Weiser, Clerk.

In United States District Court, Southern District of New York

[Title omitted]

Notice of Appeal

Sirs: Please take notice, that the plaintiff, Old Company's Lehigh, Inc., hereby appeals to the United States [fol. 32] Circuit Court of Appeals, for the Second Circuit, from the judgment in favor of the defendant, Henry E. Meeker, as Receiver for the First National Bank in Mamaroneck, and against the plaintiff, Old Company's Lehigh, Inc., dismissing the plaintiff's amended complaint, entered in the Office of the Clerk of this Court, on the 24th day of October, 1933, and the order entered herein the 9th day of October, 1933, directing said judgment, and from each and every part of said judgment and order, as well as from the whole thereof.

Dated Brooklyn, New York, December 1st, 1933.

Yours, etc., Israel H. Mandel, Attorney for Plaintiff, Office & P. O. Address: 191 Joralemon Street, Borough of Brooklyn, City and State of New York.

To Lynch, Cahn & Weed, Esqs., Attorneys for Defendant, Henry Meeker, Office & P. O. Address: Bar Building, White Plains, New York. Clerk of the United States District Court, Southern District of New York. Meighan & Necarsulmer, Esqs., Attorneys for Defendant, R. G. Brewer, Inc., 120 Broadway, New York, New York.

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[fol. 33] In United States District Court, Southern District of New York

[Title omitted]

Petition for Appeal

Old Company's Lehigh, Inc., the above named plaintiff, considering itself aggrieved by the decree of this Court, made and entered in the above entitled cause on the 9th day of October, 1933, hereby appeals from each and every

part thereof to the United States Circuit Court of Appeals, for the Second Circuit, for the reasons specified in the Assignment of Errors filed herein, and prays that this appeal may be allowed and that a transcript of the record, proceedings and papers, duly authenticated, may be transmitted to the United States Circuit Court of Appeals, for the Second Circuit.

Israel H. Mandel, Attorney for Plaintiff, Office & P. O. Address: 191 Joralemon Street, Borough of Brooklyn, City and State of New York.

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[fol. 34] In United States District Court

[Title omitted]

Order Allowing Appeal—Dec. 2, 1933

Upon reading and filing the petition of the plaintiff for an allowance of an appeal herein, and the Notice of Appeal and the Assignment of Errors, and on motion of Israel H. Mandel, attorney for plaintiff, it is hereby

Ordered, that the said appeal be and the same hereby is allowed; and it is further

Ordered, that a citation addressed to the defendant herein be issued according to law; and it is further

[fol. 35] Ordered, that a transcript of the record, papers and proceedings herein, duly authenticated by the Clerk of this Court, be transmitted to the United States Circuit Court of Appeals, for the Second Circuit, and that such other and further proceedings be had herein as may be just and proper in the premises.

Francis G. Caffey, U. S. D. J.

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In United States District Court, Southern District of New York

[Title omitted]

Assignment of Errors

And now comes Old Company's Lehigh, Inc., the plaintiff, and says that in the record and proceedings in the above entitled cause, there is error in this, to wit:

1. That the Court below erred in granting the order made and entered herein on th 22nd day of August, 1933, dis- [fol. 36] missing the complaint herein as against Henry E. Meeker, as Receiver for the First National Bank in Mamaroneck, on the ground that the said complaint failed to state a cause of action in equity, and dismissing the said complaint.

2. That the Court below erred in holding that there was no trust which entitled the plaintiff to preferential treatment in the liquidation of the bank.

3. That the Court below erred in holding that the provisions of the New York Negotiable Instruments Law were not applicable to the facts in this case, or that they are in conflict with the Federal Statutory Law.

4. That the Court below erred in holding that plaintiff was not entitled to delivery and assignment to it by the Receiver of the check of Three Thousand Fifteen ($3,- 015.00) Dollars issued by the defendant, R. G. Brewer, Inc.

5. That the Court below erred in granting the order made and entered herein on the 9th day of October, 1933, dismissing the amended complaint herein as against Henry E. Meeker, as Receiver for the First National Bank in Mamaroneck, on the ground that the said amended complaint failed to state a cause of action in equity, and dismissing the said amended complaint.

Wherefore, and for divers other reasons, as will appear in the record, plaintiff prays that the decree and the judg- [fols. 37 & 38] ment enrolled therein be reversed with directions to award judgment for plaintiff with costs.

Old Company's Lehigh, Inc., by Israel H. Mandel, Attorney for Plaintiff, Office & P. O. Address: 191 Joralemon Street, Borough of Brooklyn, City and State of New York.

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Citation in usual form omitted in printing.

[fol. 39] In United States District Court, Southern District of New York

[Title omitted]

Stipulation as to Transcript of Record

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated February —, 1934.

Israel H. Mandel, Attorney for Plaintiff. Lynch, Cahn & Weed, Attorneys for Defendant Meeker. Meighan & Necarsulmer, Attorneys for Defendant Brewer.

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[fol. 40] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 41] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1933

No. 438

Argued May 10, 1934. Decided June 4, 1934

OLD COMPANY'S LEHIGH, INC., Plaintiff-Appellant,

v.

HENRY E. MEEKER, as Receiver for THE FIRST NATIONAL BANK IN MAMARONECK, The First National Bank in Mamoroneck and R. G. Brewer, Inc., Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, Swan, and Chase, Circuit Judges

The plaintiff appeals from a decree dismissing on motion its amended bill of complaint as against the defendant Meeker as receiver for the First National Bank of Mamaroneck, on the ground that it fails to state a cause of action in equity. Decree reversed.

Israel H. Mandel, of Brooklyn, N. Y., for appellant.

Lynch, Cahn & Weed, of White Plains, N. Y. (Monroe J. Cahn, of White Plains, N. Y., and Alfred S. Schechter, of White Plains, N. Y., of counsel), for appellees.

SWAN, Circuit Judge:

The bill having been dismissed upon motion, equivalent to a demurrer, the facts must be accepted as alleged. The plaintiff, a New Jersey corporation, was the owner of a promissory note for $3,000 made by R. G. Brewer, Inc., a New York corporation, to the order of the plaintiff, and payable on January 16, 1933, at the office of the First National Bank of Mamaroneck, a corporation organized under the national banking laws. On January 12, 1933, the plaintiff deposited this note for collection with a bank in Philadelphia, which forwarded it through the Chase National Bank and the Federal Reserve Bank of New York

to the said Mamaroneck bank for collection. The latter, on January 14, 1933, accepted the check of R. G. Brewer, Inc., for $3,015, drawn upon its general deposit with said Mamaroneck bank, and delivered the note to its maker. January 14th was a Saturday, and on the following Monday, the 16th, the Mamaroneck bank did not resume business because of insolvency. In due course the defendant Meeker was appointed its receiver by the Comptroller of the Currency. Subsequently, the plaintiff filed with him a preferred claim for the sum of $3,015, which he rejected. The foregoing facts are alleged in the first count of the plaintiff's amended bill of complaint.

The second count repeats the allegations of the first and adds the following: The Mamaroneck bank was insolvent on January 14th, and Mr. Brewer, who acted for the maker of the note and was also a director and managing officer of the bank, was well aware of its insolvency and imminent receivership. In delivering the note to the maker before its maturity and in accepting the maker's check in payment, the bank exceeded its authority as agent for collection. It is charged that in so acting it was carrying out a conspiracy with R. G. Brewer, Inc., to discharge the latter's liability on its note and to defraud the plaintiff. When the bank accepted the check, R. G. Brewer, Inc., had on deposit with the bank ample funds to cover the amount thereof, and by acceptance of the check the sum of $3,015 was immediately charged against the account of R. G. [fol. 42] Brewer, Inc., and became a special trust fund in the possession of the bank to be remitted to the plaintiff, but it was not remitted.

The third count reiterates the allegations of the first and second and alleges further that the said check was accepted on January 14th after banking hours and was not charged by the bank against the deposit account of R. G. Brewer, Inc., that the receiver has possession of the check which has not yet been discharged or canceled, and that the plaintiff has demanded that the bank and its receiver assign and deliver the check to the plaintiff, but they have refused to do so.

The bill prays that the receiver be directed to pay the plaintiff's claim for $3,015 in priority to claims of general creditors, or, in the alternative, that the bank and the receiver be ordered to assign and deliver the said check to the plaintiff.

When the Mamaroneck bank received the note for collection, it held it as the plaintiff's agent. This is provided by section 350-a of the New York Negotiable Instruments Law (article 19-A, Negotiable Instruments Law [Consol. Laws, c. 38]), which governs the relations of the parties in the absence of allegations that they contracted on a different basis. See Federal Reserve Bank v. Malloy, 264 U. S. 160, 164, 44 S. Ct. 296, 68 L. Ed. 617, 31 A. L. R. 1261; Dakin v. Bayly, 290 U. S. 143, 147, 54 S. Ct. 113, 78 L. Ed. —, 90 A. L. R. 999. Hence whatever the bank collected upon the note was held in trust for the plaintiff as the latter's agent, and, if traced into the hands of the receiver, might be reclaimed. See Davis v. Elmira Savings Bank, 161 U. S. 275, 289, 16 S. Ct. 502, 40 L. Ed. 700; Commercial Bank v. Armstrong, 148 U. S. 50, 57, 13 S. Ct. 533, 37 L. Ed. 363; Evansville Bank v. German-Am. Nat. Bank, 155 U. S. 556, 562, 15 S. Ct. 221, 39 L. Ed. 259; Massey v. Fisher, 62 F. 958 (C. C. E. D. Pa.); Ellerbe v. Studebaker Corp., 21 F. (2d) 993, 994 (C. C. A. 4); Turner, "Bank Collections—The Direct Routing Practice," 39 Yale L. J. 468. The difficulty is to trace into the hands of the receiver any identifiable sum of money held on trust when the bank closed its doors. The plaintiff argues that the bank's acceptance of the check of R. G. Brewer, Inc., should be considered the same as though cash had been handed over the counter, and the amount of the check, by which the bank's liability to its depositor was pro tanto extinguished, should be treated as a special deposit commingled with its general funds and charging them with an equitable lien in favor of the plaintiff. While this view is not without support in state decisions (see 82 A. L. R. 97), it does not prevail in the federal courts. American Can Co. v. Williams, 178 F. 420 (C. C. A. 2); Larabee Flour Mills v. First Nat. Bank, 13 F. (2d) 330 (C. C. A. 8); Ellerbe v. Studebaker Corp., 21 F. (2d) 993, 995 (C. C. A. 4); Allied Mills v. Horton, 65 F. (2d) 708, 90 A. L. R. 1 (C. C. A. 7); First Nat. Bank v. City of Miami, 69 F. (2d) 346 (C. C. A. 5); Wisdom v. Keen, 69 F. (2d) 349 (C. C. A. 5); Blakey v. Brinson, 286 — S. 254, at page 263, 52 S. Ct. 516, 518, 76 L. Ed. 1089, 82 A. L. R. 1288, where the opinion of Mr. Justice Stone says:

"The cancellation of the credit balance by the debit neither suggests any intention to establish a trust nor

points to any identifiable thing which could be the subject of it."

It is true that the state statute (section 350-l, subd. 2, art. 19-A, Negotiable Instruments Law) expressly grants a preference under the circumstances at bar upon the insolvency of the drawee or payor bank, but state legislation is unavailing if contrary to the act of Congress (12 U. S. C. A. § 194) as construed by the federal courts. On the authorities above mentioned and many others which might be cited, we think it is. Compare Royal Mfg. Co. v. Spradlin, 6 F. Supp. 98, 102 (D. C. M. D. N. C.); U. S. Fidelity & Guaranty Co. v. Nat. Bank of Am., 4 F. Supp. 569 (D. C. N. D. Ind.). Consequently the District Court's decision that neither of the first two counts of the bill of complaint states a cause of action must be affirmed.

It is otherwise as to the third count. This alleges that the check received in exchange for delivery of the note to its maker was received after banking hours on January 14th, was never discharged or canceled, and came into possession of the receiver. It is true that these allegations contradict the allegation incorporated by reference from count 2 that by acceptance of the check the sum of $3,015 was immediately charged against the account of R. G. Brewer, Inc. This might necessitate an amendment to strike out the contradictory allegation, but would not justify final dismissal if the other allegations are sufficient. Plainly the intent was to frame a count on the theory that the check was not charged against the maker's account and remains unpaid. As already stated, whatever the bank received in exchange for the plaintiff's note it held on the [fol. 43] same terms as the note itself; that is, as agent for the plaintiff. The check is not only an order on the drawee bank to pay the payee itself, but is also a bill of exchange (section 321, Negotiable Instruments Law) and an engagement by the drawer to pay the amount thereof to the payee if the bill is dishonored (section 111, Negotiable Instruments Law). That obligation of the drawer the bank held in trust for the plaintiff in lieu of the note. If, as alleged, the check was delivered after banking hours and was never charged against its account, the drawer's obligation to pay the bank still exists and is still held in trust for the plaintiff. The trustee refuses to enforce it

for the plaintiff's benefit, and we see no reason why the recalcitrant trustee should not be required to make it available for direct enforcement by the plaintiff itself. If the plaintiff can prove the facts alleged, we think it is entitled to a decree directing the receiver to assign (without recourse) and deliver the check according to the alternative prayer for relief. Accordingly it was error to dismiss the third count of the bill as against the receiver. To this extent the decree is reversed.

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[fol. 44] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court rooms in the Post Office building in the City of New York, on the 11th day of June, one thousand nine hundred and thirty-four.

Present: Hon. Martin T. Manton, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

OLD COMPANY'S LEHIGH, INC., Plaintiff-Appellant,

vs.

HENRY E. MEEKER, as Receiver, etc., et al., Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, reversed as to the third count and affirmed as to the first two counts, with costs to the appellant.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 45] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Old Company's Lehigh, Inc., vs. Henry E. Meeker, as Receiver, etc. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jun. 11, 1934. William Parkin, Clerk.

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[fol. 46] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 45, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Old Company's Lehigh, Inc., Plaintiff-Appellant, against Henry E. Meeker, as Receiver, etc., et al., Defendants-Appellees, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 29th day of August, in the year of our Lord one thousand nine hundred and thirty-four, and of the Independence of the said United States the one hundred and fifty-ninth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

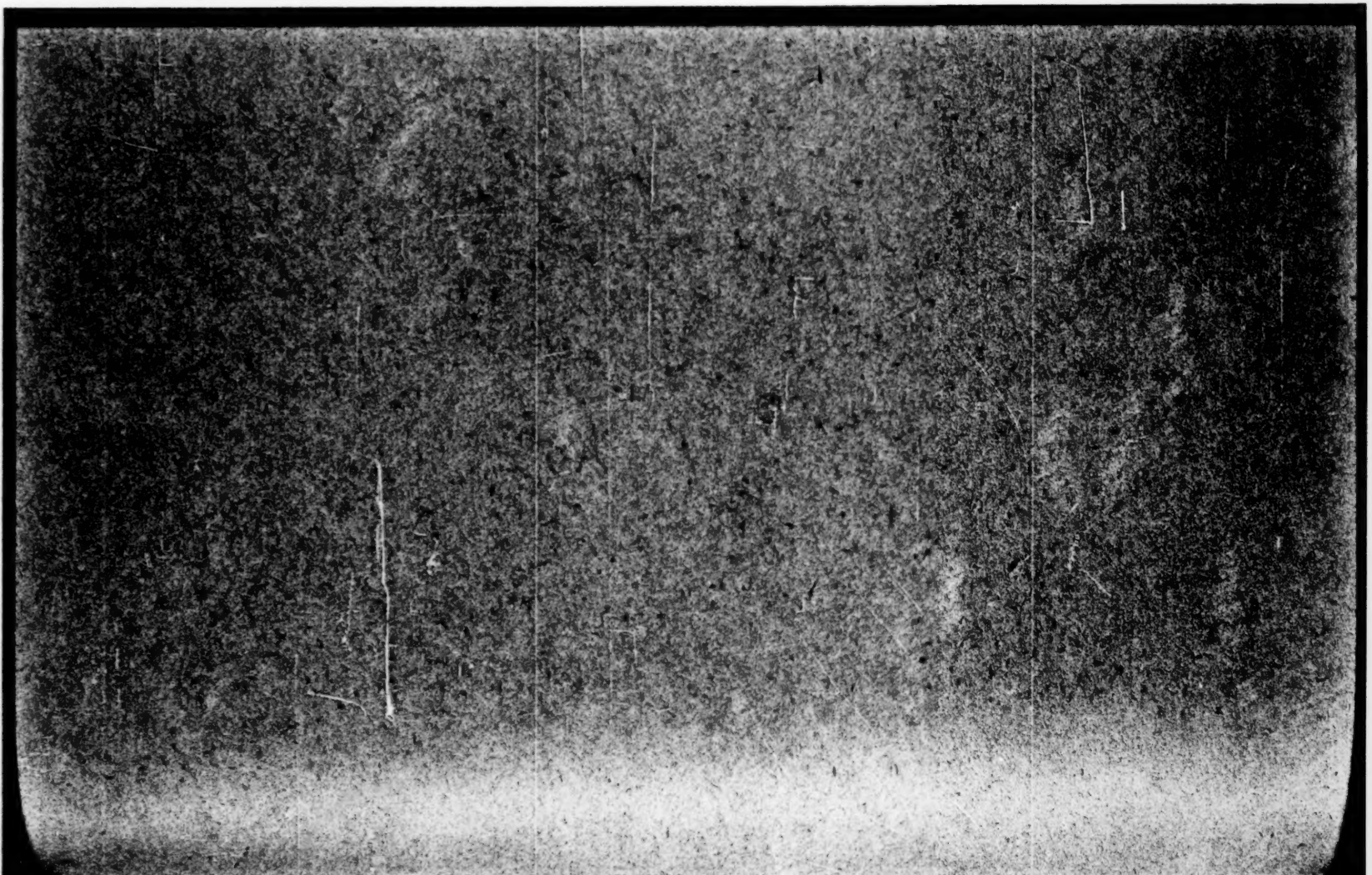
[fol. 47] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following No. 338.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,968. U. S. Circuit Court of Appeals, Second Circuit. Term No. 340. Old Company's Lehigh, Inc., Petitioner, vs. Henry E. Meeker, as Receiver for The First National Bank in Mamaroneck, et al. Petition for writ of certiorari and exhibit thereto. Filed September 1, 1934. File No. 340, O. T., 1934.



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FILED
SEP 1 1934
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1934.

No. 340

OLD COMPANY'S LEHIGH, INC.,

*Petitioner,*

*against*

HENRY E. MEEKER, as Receiver for The First National Bank in Mamaroneck, THE FIRST NATIONAL BANK IN MAMARONECK, and R. G. BREWER, INC.,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

JOSEPH G. M. BROWNE,
*Counsel for Petitioner,*
44 Court Street,
Brooklyn, New York.

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I. The decision of the Circuit Court of Appeals that Section 350-1, Subdivision 2, Article 19-A, of the New York Negotiable Instruments Law, commonly known as the Uniform Banking Code, is in conflict with the Act of Congress is erroneous and is in conflict with other federal jurisdictions holding similar state statutes to be valid and not in conflict with said Act of Congress ..... 12

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1934.

OLD COMPANY'S LEHIGH, INC.,
Petitioner,

against

HENRY E. MEEKER, as Receiver for The First National Bank in Mamaroneck, THE FIRST NATIONAL BANK IN MAMARONECK, and R. G. BREWER, INC.,
Respondents.

## PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, OLD COMPANY'S LEHIGH, INC., respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals, for the Second Circuit, to review the determination of that Court in so far as it affirms the decree of the District Court of the Southern District of New York, dismissing the first two counts of the amended bill of complaint of the petitioner. The opinion of said Court was filed on June 4th, 1934. A transcript of the record in the case, including the proceedings in the said Circuit Court of Appeals, is furnished herewith in accordance with Rule 38 of this Court.

### Summary and Short Statement of the Matter Involved.

#### 1. Nature of suit and decisions below.

This suit in equity was brought by OLD COMPANY'S LEHIGH, INC., in the United States District Court, fo

the Southern District of New York, against the defendants, HENRY E. MEEKER, as Receiver for The First National Bank in Mamaroneck, THE FIRST NATIONAL BANK IN MAMARONECK, and R. G. BREWER, INC. Three causes of action are alleged which are summarized in the opinion of the Circuit Court as follows:

> "The plaintiff, a New Jersey corporation, was the owner of a promissory note for $3,000. made by R. G. Brewer, Inc., a New York corporation, to the order of the plaintiff, and payable on January 16, 1933, at the office of the First National Bank of Mamaroneck, a corporation organized under the national banking laws. On January 12, 1933, the plaintiff deposited this note for collection with a bank in Philadelphia, which forwarded it through the Chase National Bank and the Federal Reserve Bank of New York to the said Mamaroneck bank for collection. The latter, on January 14, 1933, accepted the check of R. G. Brewer, Inc., for $3,015. drawn upon its general deposit with said Mamaroneck bank, and delivered the note to its maker. January 14th was a Saturday, and on the following Monday, the 16th, the Mamaroneck bank did not resume business because of insolvency. In due course the defendant Meeker was appointed its receiver by the Comptroller of the Currency. Subsequently, the plaintiff filed with him a preferred claim for the sum of $3,015., which he rejected. The foregoing facts are alleged in the first count of the plaintiff's amended bill of complaint.
>
> The second count repeats the allegations of the first and adds the following: The Mamaroneck bank was insolvent on January 14th, and Mr. Brewer, who acted for the maker of the note and was also a director and managing officer of the bank, was

well aware of its insolvency and imminent receivership, by delivering the note to the maker before its maturity and in accepting the maker's check on payment, the bank exceeded its authority as agent for collection. It is charged that in so acting it was carrying out a conspiracy with R. G. Brewer, Inc., to discharge the latter's liability on its note and to defraud the plaintiff. When the bank accepted the check, R. G. Brewer, Inc., had on deposit with the bank ample funds to cover the amount thereof, and by acceptance of the check the sum of $3,015. was immediately charged against the account of R. G. Brewer, Inc., and became a special trust fund in the possession of the bank to be remitted to the plaintiff, but it was not remitted.

The third count reiterates the allegations of the first and second and alleges further that the said check was accepted on January 14th, after banking hours and was not charged by the bank against the deposit ccount of R. G. Brewer, Inc., that the receiver has possession of the check which has not yet been discharged or cancelled, and that the plaintiff has demanded that the bank and its receiver assign and deliver the check to the plaintiff, but they have refused to do so."

The amended bill of complaint prays that the receiver be directed to pay the plaintiff's claim for Three Thousand and Fifteen ($3,015.00) Dollars in priority to claims of general creditors, or in the alternative that the bank and the receiver be ordered to assign and deliver said check to the plaintiff and that the defendant, R. G. Brewer, Inc., be ordered and decreed to pay the principal of said check with interest to the plaintiff.

The District Court dismissed all of the three counts in the plaintiff's amended bill of complaint on motion

of the defendant, MEEKER, as Receiver. On the appeal to the Circuit Court of Appeals, for the Second Circuit, the Circuit Court of Appeals affirmed the decree of the District Court with respect to the first two counts of the plaintiff's bill of complaint and reversed the same with respect to the third count.

The opinion of the Circuit Court of Appeals written by Circuit Judge Swan, upholds the petitioner's contentions with respect to the first two counts, to the effect that the Mamaroneck Bank received the note for collection as plaintiff's agent pursuant to the provisions of Section 350-a of the New York Negotiable Instruments Law, and that therefore whatever the bank collected upon the note was held in trust for the plaintiff by the bank as agent, and if traced into the hands of the receiver it might be reclaimed. However, the Circuit Court maintains that there is no identifiable *res* in the hands of the receiver which could be the subject of the trust. Although the Circuit Court agrees that the collecting bank acted as agent for the plaintiff and therefore held in trust anything collected upon the note, it refuses to apply the equitable doctrine that equity considers that done which in good conscience should be done, and that therefore the bank's acceptance of the check should be considered the same as though the depositor had cashed his check and handed the cash back over the counter in payment of the note, in which event, such cash would have been considered as a special fund held in trust by the bank belonging to its principal, the owner of the note, for whom the bank, as agent, received such cash in payment.

The plaintiff contended that, although the depositor had not actually cashed its check and handed the cash back over the counter in the eyes of a court of equity which treats that done which in good conscience should be done, the acceptance by the bank of the check of its

depositor resulted in creating a special deposit out of the cash in the vaults of the bank at that time, which special deposit was held in trust for the benefit of the principal, and that since the bank had not segregated and set aside this amount of money from its general funds at that time but had allowed it to remain commingled with the balance of its funds, the entire mass was impressed with a trust in favor of the plaintiff. The assets of the bank having passed into the hands of the receiver, increased by the amount of plaintiff's special deposit wrongfully commingled therewith, those assets are held by the defendant receiver subject to a preferential claim in favor of the plaintiff for the amount of its special deposit.

This view urged by the plaintiff is not only supported by decisions of many state courts, but is also supported by the Circuit Court of Appeals, for the Fifth Circuit, in the case of *Davis* v. *McNair,* 48 F. (2d) 494, which case was referred to by this Court in its decision in the case of *Blakey* v. *Brinson,* 286 U. S. 254, and in which this court stated that such a procedure, if carried out, might form the basis for the inference that a depositor of a bank no longer content with the role of a creditor had sought to establish a trust fund. The Circuit Court of Appeals, for the Second Circuit, in its opinion, refers to this very decision of this court in *Blakey* v. *Brinson, supra,* but overlooks the careful distinction drawn by this court in its opinion in the *Blakey* case, indicating that this court was not opposed to the view expressed in the case of *Davis* v. *McNair, supra,* to the effect that the "as if" doctrine applies where the intention to create a trust fund can be inferred from the acts of the parties.

Under the facts existing in the case at bar, no other inference is possible because the relationship between the collecting bank and the plaintiff was that of agent

and principal. The collecting bank, therefore, acted throughout with the intention that by accepting the check of its depositor in payment of the note due to its principal, it was doing the very same thing as if its depositor had cashed his check and handed the cash back over the counter to the bank in payment of the note, thereby establishing a trust fund belonging to the principal as the proceeds collected by the bank for the payment of the note.

The second point upon which the Circuit Court of Appeals, for the Second Circuit, refused to sustain the plaintiff's right to a preferred claim is as follows:

The plaintiff, in its first and second cause of action, also predicated its right to a preferred claim against the receiver of the bank by virtue of the provisions of Section 350-1, Subdivision 2, Article 19-A of the Negotiable Instruments law of the State of New York, commonly known as the Uniform Banking Code. This state statute grants a lien and impresses a trust on the assets of the collecting bank in favor of the owner of the note placed with it for collection. The Circuit Court of Appeals, for the Second Circuit, in its opinion, held that this section of the Uniform Banking Code is contrary to the Act of Congress (12 U. S. C. A. § 194), but also points out, in its opinion, contrary federal authorities on this point, namely, *Royal Mfg. Co.* v. *Spradlin,* 6 F. Supp. 98 (D. C. M. D. N. C.); *U. S. Fidelity & Guaranty Co.* v. *Nat. Bank of Am.,* 4 F. Supp. 569 (D. C. N. Ind.). The opinion of the Circuit Court, for the Second Circuit, thus indicates that there is a conflict of authority in the Federal Courts as to the validity of this section of the Uniform Banking Code. The salutary provisions of a state statute constituting a part of the Uniform Banking Code should not be lightly brushed aside unless its conflict with the act of Congress (12 U. S. C. A. § 194) is established

beyond doubt. The review by this court of the decision of the Circuit Court holding this state statute as contrary to the act of Congress is warranted not only because of the conflict of authority in the Federal Courts on this point, but because such an important and far reaching enactment (made uniform in many of the several states) should be upheld by the Federal Courts unless it is established beyond any doubt that the apparent conflict with the act of Congress is beyond reconciliation.

**Reasons Relied on for the Granting of a Writ of Certiorari.**

The discretionary power of this court is invoked upon the following grounds:

1. The effect of the decision of the Circuit Court of Appeals, for the Second Circuit, in this case, is to nullify the provisions of Section 350-1, Subdivision 2, Article 19-A of the New York Negotiable Instruments Law, representing part of the Uniform Banking Code, in so far as its provisions affect national banks. No federal decisions other than that of the Circuit Court of Appeals, for the Second Circuit, in this case, declaring this state statute to be in conflict with the act of Congress (12 U. S. C. A. § 194), seem to be reported. On the other hand, the only other federal decisions dealing with the validity of similar state statutes are the cases of *Royal Mfg. Co.* v. *Spradlin, supra,* and *U. S. Fidelity & Guaranty Co.* v. *Nat. Bank of Am., supra,* both of which uphold the validity of such state statutes. We, therefore, find a distinct conflict existing on this point between the Second Circuit and the other two jurisdictions.

The two cases of *Royal Mfg. Co.* v. *Spradlin, supra,* and *U. S. Fidelity & Guaranty Co.* v. *Nat. Bank of Am., supra,* support the view of the plaintiff that the state statute creates a lien and impresses a trust which is

in being before the insolvency of a national bank takes place, and that therefore the state statute does not seek to regulate the distribution of the assets of an insolvent national bank. The federal rule does not require that money in the possession of a national bank shall be considered as assets, so that any monies in the possession of a national bank which are subject to a lien or trust created by the operation of a state statute, such monies in passing to the hands of the receiver upon insolvency pass subject to the lien, or trust, created by the state statute.

It is respectfully submitted that the great benefits resulting to the community by the adoption of uniform legislation in the several states should be upheld, in the Federal Courts, unless a conflict between such state statute and the acts of Congress is evident and proves to be beyond the hope of reconciliation. The granting of a writ of certiorari in the case at bar, and a review by the Supreme Court of this question, resolving the conflict of authority in the Federal Courts and settling the question of the validity of this section of the Uniform Banking Code, will result in a great benefit to the community, and will correct the injustice to the petitioner who has been deprived of the protection of this state statute.

2. The construction of the Circuit Court of Appeals, for the Second Circuit to the effect that, without the aid of the provisions of the state statute, it is necessary to trace into the hands of the receiver an identifiable sum of money held in trust when the bank closed its door in order to establish a preferred claim in favor of the plaintiff, has not only resulted in a great injustice to the plaintiff but has added to the confusion and to the conflict of authority that now exists in several of the Circuit Courts on this question. The petitioner respectfully submits that it can make no difference that

instead of cashing a check and then delivering the money to the bank in payment of the plaintiff's note, the depositor delivered his check to the bank who charged his account with the amount of the check and delivered to him the note of the plaintiff which it was collecting as the agent of the plaintiff. There is nothing in the act of Congress (12 U. S. C. A. § 194), which requires a Federal Court to disregard all equitable principles and maxims upon the insolvency of a national bank. Since equity considers the substance of things rather than their form and considers that done which in good conscience should be done, it is respectfully submitted that without actual delivery to the customer and a redeposit by him for a special purpose, a general deposit may by agreement be converted into a special deposit and become a fund in the hands of the banker with which he is entrusted for the specific purpose named in the agreement creating the special deposit.

In view of the fact that the collecting bank herein acted as agent for the plaintiff and received the proceeds of the collection in trust for the plaintiff, no other intention can be attributed to the collecting bank than that it intended by the acceptance of the check of its depositor to create a special deposit out of its general deposit and to hold the same in trust to be remitted to the plaintiff in payment of its note. Although this special deposit was not segregated and was commingled with the remaining funds of the bank, the entire mass is subject to a trust in favor of the plaintiff.

In the case of *Blakey* v. *Brinson, supra,* this court considered this question, and though it found a debtor and creditor relation existing throughout between the bank and its depositor, under the facts in that case, it referred to the "as if" doctrine urged by the petitioner herein and approved in the case of *Davis* v. *McNair, supra,* and indicated that the "as if" doctrine would apply where the facts warranted the inference that there

was an intention to cancel the debtor and creditor relationship and to create a special fund for a specific purpose.

It is, therefore, respectfully submitted that the granting of a writ of certiorari in the case at bar, and the consideration by this court of this question on appeal, will serve to definitely settle this question on which the Circuit Courts are in conflict, and will restore to the petitioner the rights to which it is entitled under the elementary principles of equity which have become clouded and confused in cases of this character because of the conflicting opinions of several of the Circuit Courts.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 438, *Old Company's Lehigh, Inc., Appellant* v. *Henry E. Meeker, as Receiver of the First National Bank in Mamaroneck, The First National Bank in Mamaroneck and R. G. Brewer, Inc., Appellees,* and that the said decree or judgment of the said United States Circuit Court of Appeals for the Second Circuit, in so far as it affirms the decision of the District Court dismissing the first two counts of the amended bill of complaint, be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

OLD COMPANY'S LEHIGH, INC.,
By JOSEPH G. M. BROWNE,
*Counsel for Petitioner.*

## BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the Circuit Court of Appeals, for the Second Circuit, is reported in 71 F. (2d) 280.

### Jurisdiction.

The grounds of jurisdiction are as follows:

1. The decision of the Circuit Court of Appeals, for the Second Circuit, was filed on June 4th, 1934.

2. The judgment was rendered in a suit in equity.

3. The statute under which jurisdiction is invoked is Section 240 (a) of the Judicial Code, 28 U. S. C. A. Sec. 347, as amended by the Act of February 13, 1925.

### Statement.

The facts are stated in the petition.

### Specification of Errors.

The errors which petitioner will urge if the writ of certiorari is allowed are that the Circuit Court of Appeals, for the Second Circuit, erred:

1. In holding that the plaintiff has failed to state a cause of action in equity in the first and second counts of its amended bill of complaint by construing Section 350-1, Subdivision 2, Article 19-A, of the New York Negotiable Instruments Law, commonly known as the Uniform Banking Code, to be contrary to the Act of Congress (12 U. S. C. A. §194).

2. In holding that the plaintiff has failed to state a cause of action in equity in the first and second counts

of its amended complaint by failing to establish an identifiable sum held on trust although plaintiff claims a special deposit commingled with the general funds of the bank, which general funds should be impressed with a trust.

### Summary of Argument.

POINT I. The decision of the Circuit Court of Appeals that Section 350-1, Subdivision 2, Article 19-A, of the New York Negotiable Instruments Law, commonly known as the Uniform Banking Code, is in conflict with the Act of Congress is erroneous and is in conflict with other federal jurisdictions holding similar state statutes to be valid and not in conflict with said Act of Congress.

POINT II. The construction of the Circuit Court of Appeals for the Second Circuit requiring the tracing of an identifiable sum of money when the bank closed its doors, is erroneous and is based on a misconception of the views of this court as expressed in the case of *Blakey* v. *Brinson, supra.*

## ARGUMENT I.

**The Decision of the Circuit Court of Appeals that Section 350-1, Subdivision 2, Article 19-A, of the New York Negotiable Instruments Law, commonly known as the Uniform Banking Code, is in conflict with the Act of Congress is erroneous and is in conflict with other federal jurisdictions holding similar state statutes to be valid and not in conflict with said Act of Congress.**

This Court, in the case of *Davis* v. *Elmira Savings Bank,* 161 U. S. 275, carefully distinguished the elements which indicate when a state statute is not in con-

flict with the Act of Congress which requires the making of ratable dividends. We quote from said decision the portion which sets forth the requirements necessary:

> "True it is that where, by State law a lien is made to result from a particular contract, that lien, when its existence is not incompatible with the Act of Congress, will be enforced. True, also, where a particular contract is made by a national bank which from its nature gives rise at the time of the contract to a claim on a specific fund, such claim, if not violative of the Act of Congress will be allowed. To that effect are the authorities relied on.
>
> Thus it was said by this Court in *Scott* v. *Armstrong,* 146 U. S. 499, when dealing with the question of setoff: 'The requirement as to ratable dividends is to make them from what belongs to the bank, and that which at the time of the insolvency belongs of right to the debtor, does not belong to the bank.' So in the case of *San Diego County* v. *California Nat. Bank,* 52 Fed. Rep. 59, it was decided that the funds received by a national bank, which the party deposited had no authority of law to deposit, were not part of the assets to be 'ratably distributed', but must be returned in full to the rightful owner. And, again in *Massey* v. *Fisher,* 62 Fed. Rep. 958, which was a case where an indorser paid the amount of a note to a bank and took a receipt, but before he took the note from the bank the bank failed, the substance of the decision was, that the money did not belong to the bank, but was held by it in trust; and, of course, in that case it was not part of its assets."

Although this Court determined, in the *Elmira* case, that the state statute there under consideration did not

fulfill these requirements and was therefore in conflict with the federal law, it recognizes that where the lien created by the state statute arose from a relationship that was not of an ordinary creditor and gave rise to a specific lien resulting from the contract which was in being before the insolvency took place, such state statute would be valid. The opinion in the *Elmira* case, *supra*, refers again to the cases cited by it on this point and continues as follows:

> "They all reason to demonstrate that from the particular facts stated the relation was not that of an ordinary creditor, but was one giving rise to a specific lien or rights resulting from the contract and which was in being before the insolvency took place."

In the case at bar, the Circuit Court of Appeals, for the Second Circuit, in deciding against the validity of the state statute herein, directs attention to two contrary federal authorities. We quote from the first of these recent cases, namely, *United States Fidelity and Guaranty Co.* v. *National Bank of America*, 4 Fed. Supp. 569, as follows:

> "The question then resolves itself to the inquiry as to whether the money in the hands of the receiver as collected under the Indiana Uniform Bank Collection Code (Acts 1929, c. 164) was the money of the bank, and so constituted assets, or was the money held in, or impressed with, a trust, and hence not assets of the bank, which the receiver in charge could legally turn over to the Comptroller for ratable distribution under the federal Statute.
>
> There is no doubt that the National Banking Act (See 12 U. S. C. A., Section 21, *et seq.*) and deci-

sions of the federal courts control in the distribution of the assets of an insolvent national bank. They, the assets, must be ratably distributed to all the creditors, but did the money in controversy constitute assets of the bank? Did the money so collected belong to the bank? Did the bank get title to the money or was it the money of plaintiff held in trust by the insolvent bank?

Defendant argues that to adopt the theory that the Statute of Indiana in controlling on the question of agency is equivalent to holding that each State in the union may adopt rules for distribution of assets of insolvent national banks. The results are not so far-reaching.

The federal rule is that a receiver of an insolvent national bank shall turn over for distribution the assets of the failed bank, not the assets, cash, or property of some other person held by such insolvent bank as agent or in trust. The federal rule does not require that money in the possession of a national bank shall be considered assets.

The Indiana State rule is that money collected as this money was shall be held by the collecting bank as agent. There appears to be no conflict between the federal statute providing for ratable distribution of assets and the decisions of the federal Courts under that Statute and the Uniform Bank Collection Code of Indiana. National banks are amenable to the laws of the State in which they operate. They are governed in all respects by the State law, except where the State law contravenes the federal law, in which case the federal law is controlling. See *McClellan* v. *Chipman,* 164 U. S. 347, 17 S. Ct. 85, 41 L. Ed. 461, where the Supreme Court of the United States lays down the rule in the following language: 'The rule being the operation of

general State laws upon the dealings and contracts of national banks; the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States, or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the Stated States.'

The Court in this opinion used the following language: 'The purpose and object of Congress in enacting the national bank law was to leave such banks, as to their contracts in general, under the operation of the State law, and thereby invest them as federal agencies with local strength, while at the same time preserving them from undue State interference wherever Congress, within the limit of its constitutional authority, has expressly so directed, or wherever such State interference frustrates the lawful purpose of Congress, or impairs the efficiency of the banks to discharge the duties imposed upon them by the law of the United States.'

The State law of Indiana provides explicitly that the fund in question shall be held as agent or subagent. The federal law contains no contrary provision. To sustain plaintiff's contention is to give effect to the Indiana Code, as well as to the federal acts. To sustain defendant's contention would be to destroy the effect of the Indiana Code as applied to national banks. The constitutionality of the Indiana Uniform Bank Collection Code is not challenged. It is and was in full force and effect at the time of this transaction.

Sec. 2, Ch. 164 of the Indiana Acts of 1929, page 515, provides that 'where an item is deposited or received for collection, the bank of deposit shall be the agent of the depositor for its collection and

each subsequent collecting bank shall be subagent of the depositor.'

Sec. 1 of the same act at p. 514 provides that: 'The term bank shall include any person, firm or corporation engaged in the business of receiving and paying deposits of money within this State.'

No authority has been cited and I think none can be, that directs or permits the appropriation by a receiver of funds held in trust or as agent for another person. These funds must be paid over by the receiver to the owner thereof. They do not constitute assets of the failed bank, do not belong to the bank, and the receiver has no right to hold them or pay them over to the Comptroller for distribution or to do anything with them except to turn them over to the rightful owner, the plaintiff in this case."

The reasoning of the opinion in the foregoing case is so clearly applicable to the case at bar as to make it unnecessary to use further words to emphasize its application.

The other case cited by the Circuit Court on the same question is even more recent, and equally strong, in upholding the validity of a similar state statute. It is the case of *Royal Mfg. Co.* v. *Spradlin,* 6 Fed. Supp. 198, decided February 5th, 1934. We quote from said decision as follows:

"The mere fact that the proviso is attached to a section of the North Carolina statute dealing with the distribution of the assets of insolvent banks does not confine its operation to insolvent banks. It clearly establishes a lien in favor of one who sends by mail, etc., a draft, etc., for collection, with request that remittance be made therefor, and

which is collected by charging it to the account in the bank, and failing to remit therefor, or the non-payment of a check sent in payment therefor, which lien attaches to the assets of the bank making the collection from the date of the charge, entry, or collection of any such funds. The lien, therefore, is in no wise contingent upon the insolvency of the bank. It attaches, in all cases, 'from the date of the charge, entry or collection of any such funds.' The lien exists before insolvency and subsequent insolvency does not invalidate it. Moreover, it is not attempting to prefer one creditor over another in cases of insolvency, but the purpose of the act is to make a lien against the assets of any collecting bank until it pays the proceeds of collection made by it as agent. The language is perfectly plain. It was to put an end to court decisions making the collecting bank a mere common debtor and denying the principal the right to reach his property in the hands of his agent.

The banks receive a fee for collecting drafts sent to them. If a lien attaches in favor of the sender, if sent to a state bank, a national bank would be unable to compete in that field, with a state bank, if a similar lien does not attach against the assets of a national bank.

Assuming then that the state statute is applicable to national banks, does it conflict with the acts of Congress or frustrate the purposes for which national banks are created? Congress has not legislated at all on the liabilities of a bank as collecting agent. It has provided for the distribution of the assets of insolvent banks. 12 U. S. C. A. §194. But the provisions of this statute and 12 U. S. C. A. §91 do not conflict with the North Carolina statute,

nor does that statute in any way frustrate the objects for which national banks are created.

The case of *Dakin* v. *Bayly, supra,* involved the construction of a state statute in regard to set-off, and the decision turned on the construction of the state statute. It is an authority also for the proposition that the collecting bank is agent, not alone to collect, but to remit the proceeds of the collection. In view of this decision and of the others cited above, and of the state statute here involved, the assets in the hand of the receiver are subject to the lien created by the North Carolina statute, and the receiver must pay it out of the assets."

It is respectfully submitted that the opinion of the Circuit Court of Appeals, for the Second Circuit, destroys the benefits of the Uniform Banking Code in so far as it affects national banks. The state statute herein merely creates a lien against the assets of the bank based on the agency contract for collection. This lien comes into being before the insolvency takes place and therefore is not an attempt by the state to regulate the distribution of the assets of an insolvent national bank. The granting of a writ of certiorari herein, and the review of this question by this court on appeal, will not only serve to correct the injustice to the petitioner in the case at bar, but will prove of great benefit to the commercial community in settling the conflict of authority in the federal courts as to the validity of this section of the Uniform Banking Code in so far as it applies to national banks.

## ARGUMENT II.

**The construction of the Circuit Court of Appeals for the Second Circuit requiring the tracing of an identifiable sum of money when the bank closed its doors, is erroneous and is based on a misconception of the views of this Court as expressed in the case of *Blakey v. Brinson, supra.***

In the case of *Blakey* v. *Brinson, supra,* this Court determined that a debtor and creditor relation existed throughout between the bank and its depositor, but apparently does not disagree with the Circuit Court of Appeals, for the Fourth Circuit, in its reasoning wherein it sought to apply the "as if" doctrine. We quote from the decision in the case of *Blakey* v. *Brinson, supra*:

> "The Court below thought that the legal consequences to be attributed to the debiting of the account with the supposed purchase price of the bonds was the same as if the respondent had cashed a check for the amount and had then proceeded to hand the money back to the bank under a specific agreement between him and the bank that the money was to be held as a special fund, for the sole purpose of completing the purchase. This view is not without support. See *Davis* v. *McNair,* 48 F. (2d) 494; *State* v. *Grills,* 35 R. I. 70, 75; 85 Atl. 281; *Northwest Lumber Co.* v. *Scandinavian American Bank,* 130 Wash. 33; 225 Pac. 825; *State* v. *American Exchange Bank,* 112 Neb. 834; 201 N. W. 895."

After citing the contrary authorities on this point, this Court indicates, in said opinion, a passive approval

of the "as if" doctrine where the facts warrant an inference that a debtor and creditor relationship was not intended, and the establishment of a trust fund was contemplated, by expressing its view with respect to such a situation as follows:

> "Such a procedure, if actually carried out, might afford a basis, which is lacking here, for the inference that respondent, no longer content with the role of creditor, had sought to establish a trust fund."

In the case of *Davis* v. *McNair, supra,* it was clearly shown that to support a trust, it is not necessary to have augmentation in the sense of new money being brought into the bank from the outside where the facts warranted the inference that the relation of the bank towards money which it theretofore held on general deposit was changed from that of owner to that of agent or trustee. In said case, the Court held that by what was done the relations of the parties with respect to the funds were so changed that thereafter the deposit was in the nature of a special fund, having the trust features of a special deposit. Such special deposit, though not segregated and set aside, and though it be commingled with the remaining funds of the bank, does not lose its trust features because it is confounded in the general mass. The modern rule holds that to accomplish the ends of justice, a trust will be impressed upon the entire mass.

*Frelinghuysen* v. *Nugent,* 36 Fed. 229, 239;
*Peters* v. *Baine,* 133 U. S. 670;
*Brennan* v. *Tillingast,* 201 Fed. 609;
*Quin* v. *Earle,* 95 F. 728, 731;
*Central Nat. Bank* v. *Conn. Mut. Life Ins. Co.,* 104 U. S. 54, 26 L. Ed. 693;

*Knatchbull* v. *Hallett,* 13 Ch. Div. 696; notes 32 Am. St. Rep. 129; L. R. A. 1916 C., 31;
*Poisson* v. *Williams,* 15 F. (2d) 582;
*Schumacker* v. *Harriet,* 52 F. (2d) 817;
*Tucker* v. *Newcomb,* 67 F. (2d) 177.

The Circuit Court of Appeals, for the Fifth Circuit, carefully expressed itself in a well reasoned decision on this question in the case of *City of Miami* v. *First National Bank of St. Petersburg,* 58 F. (2) 561, which said decision was cited with approval by this Court in the case of *Dakin* v. *Bayly,* 290 U. S. 143.

The same case came up for consideration a second time before the said Circuit Court after judgment, and in the second opinion the Court reversed its former position, basing its new decision on the ground that no identifiable *res* had been established upon which the trust could rest. The second decision of the Circuit Court of Appeals, for the Fifth Circuit, evidently was rendered without knowledge of the fact that this court had, in the case of *Dakin* v. *Bayly, supra,* cited its first opinion with approval.

A comparison of the latter opinion in the said case of *City of Miami* v. *First National Bank of St. Petersburg,* 69 F. (2d) 346, with the former opinion in the same case discloses that the reasoning in the second opinion cannot be reconciled with the reasoning of the first. Although the first opinion carefully and exhaustively considers every element involved, it contains no hint that an all destroying principle, in the form of a requirement of an identifiable *res,* lurked in the background. This question, of an identifiable *res,* upon which the second opinion is based is also the ground upon which the Circuit Court of Appeals, for the Second Circuit, in this case bases its denial of relief to the plaintiff. It conflicts with the "as if" doctrine passively

approved by this court in the case of *Blakey* v. *Brinson, supra,* and has served to add even greater confusion to conflict of views which previously existed on this point in several circuits.

A multiplying number of cases of this character, occasioned by the insolvency of numerous national banks due to the depression, are coming up with the increasing frequency before the federal courts in almost every jurisdiction. The granting of a writ of certiorari in the case at bar, and the affirmative approval by this court on appeal of the "as if" doctrine which was passively approved in the decision of the case of *Blakey* v. *Brinson, supra,* will restore to the petitioner the rights to which it is entitled in justice and equity and will prove of benefit to the community in resolving the conflict and confusion on this subject that now exists in the various circuits.

## Conclusion.

For the foregoing reasons, it is submitted that this cause presents two important questions for consideration and determination by this Court, on both of which questions there is a conflict of authority in the federal courts, and the settlement of both of which would result in great benefit to the public. It is, therefore, respectfully submitted that the case justifies the issuance of a writ of certiorari.

Respectfully submitted,

JOSEPH G. M. BROWNE,
*Counsel for Petitioner.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1934.

No. 340.

OLD COMPANY'S LEHIGH, INC.,
*Petitioner,*

*against*

HENRY E. MEEKER, as Receiver, for the FIRST NATIONAL BANK IN MAMARONECK, *et al.*,
*Respondents.*

# BRIEF ON BEHALF OF PETITIONER.

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT**

ISRAEL H. MANDEL,
*Counsel for Petitioner.*

JOSEPH G. M. BROWNE,
*Attorney for Petitioner.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1934.

No. 340

OLD COMPANY'S LEHIGH, INC.,
Petitioner,
against
HENRY E. MEEKER, as Receiver for The First National Bank in Mamaroneck, THE FIRST NATIONAL BANK IN MAMARONECK, and R. G. BREWER, INC.,
Respondents.

## BRIEF ON BEHALF OF PETITIONER.

The opinion of the Circuit Court of Appeals, for the Second Circuit, is reported in 71 F. (2d) 280, (Rec. 23 to 28).

### Jurisdiction.

The grounds of jurisdiction are as follows:

1. The decision of the Circuit Court of Appeals, for the Second Circuit, was filed on June 4th, 1934.

2. The judgment was rendered in a suit in equity (Rec. 18).

3. The statute under which jurisdiction is invoked is Section 240 (a) of the Judicial Code, 28 U. S. C. A. § 347, as amended by the Act of February 13, 1925.

4. The petition for a writ of certiorari herein was duly granted (Rec. 29).

**Statement.**

The facts are not in dispute and are as follows:

This suit in equity was brought by Old Company's Lehigh, Inc., in the United States District Court, for Southern District of New York, against the defendants' HENRY E. MEEKER, as Receiver for The First National Bank in Mamaroneck, THE FIRST NATIONAL BANK IN MAMARONECK, and R. G. BREWER, INC. Three causes of action are alleged in which are summarized in the opinion of the Circuit Court as follows:

> "The plaintiff, a New Jersey corporation, was the owner of a promissory note for $3,000. made by R. G. Brewer, Inc., a New York corporation, to the order of the plaintiff, and payable on January 16, 1933, at the office of the First National Bank of Mamaroneck, a corporation organized under the national banking laws. On January 12, 1933, the plaintiff deposited this note for collection with a bank in Philadelphia, which forwarded it through the Chase National Bank and the Federal Reserve Bank of New York to the said Mamaroneck bank for collection. The latter, on January 14, 1933, accepted the check of R. G. Brewer, Inc., for $3,015. drawn upon its general deposit with said Mamaroneck bank, and delivered the note to its maker. January 14th was a Saturday, and on the following Monday, the 16th, the Mamaroneck bank did not resume business because of insolvency. In due course, the defendant Meeker was appointed its receiver by the Comptroller of the Currency. Subsequently, the plaintiff filed with him a preferred claim for the sum of $3,015., which he rejected.

The foregoing facts are alleged in the first count of the plaintiff's amended bill of complaint.

The second count repeats the allegations of the first and adds the following: The Mamaroneck bank was insolvent on January 14th, and Mr. Brewer, who acted for the maker of the note and was also a director and managing officer of the bank, was well aware of its insolvency and imminent receivership, by delivering the note to the maker before its maturity and in accepting the maker's check on payment, the bank exceeded its authority as agent for collection. It is charged that in so acting it was carrying out a conspiracy with R. G. Brewer, Inc., to discharge the latter's liability on its note and to defraud the plaintiff. When the bank accepted the check, R. G. Brewer, Inc., had on deposit with the bank ample funds to cover the amount thereof, and by acceptance of the check the sum of $3,015. was immediately charged against the account of R. G. Brewer, Inc., and became a special trust fund in the possession of the bank to be remitted to the plaintiff, but it was not remitted.

The third count reiterates the allegations of the first and second and alleges further that the said check was accepted on January 14th, after banking hours and was not charged by the bank against the deposit account of R. G. Brewer, Inc., that the receiver has possession of the check which has not yet been discharged or cancelled, and that the plaintiff has demanded that the bank and its receiver assign and deliver the check to the plaintiff, but they have refused to do so." (Rec. 23 to 24).

The amended bill of complaint prays that the receiver be directed to pay the appellant's claim for

Three Thousand and Fifteen ($3,015.00) Dollars in priority to claims of general creditors, or in the alternative that the bank and the receiver be ordered to assign and deliver said check to the plaintiff and that the defendant, R. G. BREWER, INC., be ordered and decreed to pay the principal of said check with interest to the plaintiff (Rec. 9 to 16).

The District Court dismissed all of the three counts in the appellant's amended bill of complaint on motion of the defendant, MEEKER, as Receiver (Rec. 17 to 18). On the appeal to the Circuit Court of Appeals, for the Second Circuit, the Circuit Court of Appeals affirmed the decree of the District Court with respect to the first two counts of the appellant's bill of complaint and reversed the same with respect to the third count (Rec. 23 to 28).

The opinion of the Circuit Court of Appeals written by Circuit Judge Swan, upholds the appellant's contentions with respect to the first two counts, to the effect that the Mamaroneck Bank received the note for collection as appellant's agent pursuant to the provisions of Section 350-a of the New York Negotiable Instruments Law, and that therefore whatever the bank collected upon the note was held in trust for the appellant by the bank as agent, and if traced into the hands of the receiver it might be reclaimed. However, the Circuit Court maintains that there is no identifiable *res* in the hands of the receiver which could be the subject of the trust. Although the Circuit Court agrees that the collecting bank acted as agent for the appellant and therefore held in trust anything collected upon the note, it refuses to apply the equitable doctrine that equity considers that done which in good conscience should be done, and that therefore the bank's acceptance of the check should be considered the same as though

the depositor had cashed his check and handed the cash back over the counter in payment of the note, in which event, such cash would have been considered as a special fund held in trust by the bank belonging to its principal, the owner of the note, for whom the bank, as agent, received such cash in payment.

The appellant contended that, although the depositor had not actually cashed its check and handed the cash back over the counter that in the eyes of a court of equity which treats that done which in good conscience should be done, the acceptance by the bank of the check of its depositor resulted in creating a special deposit out of the cash in the vaults of the bank at that time, which special deposit was held in trust for the benefit of the principal, and that since the bank had not segregated and set aside this amount of money from its general funds at that time but had allowed it to remain commingled with the balance of its funds, the entire mass was impressed with a trust in favor of the appellant. The assets of the bank having passed into the hands of the receiver, increased by the amount of appellant's special deposit wrongfully commingled therewith, those assets are held by the defendant receiver subject to a preferential claim in favor of the appellant for the amount of its special deposit.

This view urged by the appellant is not only supported by decisions of many state courts, but is also supported by the Circuit Court of Appeals, for the Fifth Circuit, in the case of *Davis* v. *McNair,* 48 F. (2d) 494, which case was referred to by this Court in its decision in the case of *Blakey* v. *Brinson,* 286 U. S. 254, and in which this Court stated that such a procedure, if carried out, might form the basis for the inference that a depositor of a bank no longer content with the role of a creditor had sought to estab-

lish a trust fund. The Circuit Court of Appeals, for the Second Circuit, in its opinion, refers to this very decision of this Court in *Blakey* v. *Brinson*, *supra*, but overlooks the careful distinction drawn by this Court in its opinion in the *Blakey* case, indicating that this Court was not opposed to the view expressed in the case of *Davis* v. *McNair*, *supra*, to the effect that the "as if" doctrine applies where the intention to create a trust fund can be inferred from the acts of the parties.

Under the facts existing in the case at bar, no other inference is possible because the relationship between the collecting bank and the plaintiff was that of agent and principal. The collecting bank, therefore, acted throughout with the intention that by accepting the check of its depositor in payment of the note due to its principal, it was doing the very same thing as if its depositor had cashed his check and handed the cash back over the counter to the bank in payment of the note, thereby establishing a trust fund belonging to the principal as the proceeds collected by the bank for the payment of the note.

The other point upon which the Circuit Court of Appeals, for the Second Circuit, refused to sustain the appellant's right to a preferred claim is as follows (Rec. 25 to 27):

The plaintiff, in its first and second causes of action, also predicated its right to a preferred claim against the receiver of the bank by virtue of the provisions of Section 350-1, Subdivision 2, Article 19-A of the Negotiable Instruments Law of the State of New York, commonly known as the Uniform Bank Collection Code. This state statute grants a lien and impresses a trust on the assets of the collecting bank, in favor of the owner of the note placed with it for

collection. The Circuit Court of Appeals, for the Second Circuit, in its opinion, held that this section of the Uniform Bank Collection Code is contrary to the Act of Congress (12 U. S. C. A. § 194), but also points out, in its opinion, contrary federal authorities on this point, namely, *Royal Mfg. Co.* v. *Spradlin*, 6 F. Supp. 98 (D. C. M. D. N. C.); *U. S. Fidelity & Guaranty Co.* v. *Nat. Bank of Am.*, 4 F. Supp. 569 (D. C. N. Ind.). The opinion of the Circuit Court, for the Second Circuit, thus indicates that there is a conflict of authority in the Federal Courts as to the validity of this section of the Uniform Bank Collection Code.

The opinion of the Circuit Court of Appeals, for the Second Circuit, is therefore the sole federal authority holding this section of the Uniform Bank Collection Code to be in conflict with federal law. The other two circuits which have had occasion to consider this question have held this state statute to be valid. The Uniform Bank Collection Code was first adopted in the year, 1929, and has since become the law in eighteen of the several states. It is only a matter of time before the remaining states will adopt its provisions. The salutary provisions of this uniform state statute should, therefore, not be lightly brushed aside unless its alleged conflict with the Act of Congress is established beyond the hope of reconciliation.

## Specification of Errors.

The appellant contends that the Circuit Court of Appeals, for the Second Circuit, erred:

1. In holding that the plaintiff has failed to state a cause of action in equity in the first and second counts

of its amended bill of complaint by construing Section 350-1, Subdivision 2, Article 19-A, of the New York Negotiable Instruments Law, commonly known as the Uniform Bank Collection Code, to be contrary to the Act of Congress (12 U. S. C. A. § 194).

2. In holding that the plaintiff has failed to state a cause of action in equity in the first and second counts of its amended complaint by failing to establish an identifiable sum held on trust although plaintiff claims a special deposit commingled with the general funds of the bank, which general funds should be impressed with a trust.

## ARGUMENT AND LAW.

### Summary.

POINT I. The decision of the Circuit Court of Appeals that Section 350-1, Subdivision 2, Article 19-A of the New York Negotiable Instruments Law, commonly known as the Uniform Bank Collection Code, is in conflict with the Act of Congress (12 U. S. C. A. § 194), is erroneous and is in conflict with other federal jurisdictions holding similar state statutes to be valid and not in conflict with said Act of Congress.

POINT II. The construction of the Circuit Court of Appeals, for the Second Circuit, to the effect that the appellant has been unable to overcome the difficulty of tracing an identifiable sum of money held on trust when the bank closed its doors, is erroneous and is based on a misconception of the views of this Court, as expressed in the case of *Blakey* v. *Brinson*, 286 U. S. 254.

## ARGUMENT I.

**The decision of the Circuit Court of Appeals that Section 350-1, Subdivision 2, Article 19-A of the New York Negotiable Instruments Law, commonly known as the Uniform Bank Collection Code, is in conflict with the act of Congress (12 U. S. C. A. § 194), is erroneous and is in conflict with other federal jurisdictions holding similar state statutes to be valid and not in conflict with said act of Congress.**

This Court, in the case of *Davis* v. *Elmira Savings* Bank, 161 U. S. 275, carefully distinguished the elements which indicate when a state statute is not in conflict with the Act of Congress which requires the making of ratable dividends. We quote from said decision the portion which sets forth the requirements necessary:

> "True it is that where, by State law a lien is made to result from a particular contract, that lien, when its existence is not incompatible with the Act of Congress, will be enforced. True, also, where a particular contract is made by a national bank which from its nature gives rise at the time of the contract to a claim on a specific fund, such claim, if not violative of the Act of Congress will be allowed. To that effect are the authorities relied on.
>
> Thus it was said by this Court in *Scott* v. *Armstrong*, 146 U. S. 499, when dealing with the question of setoff: 'The requirement as to ratable dividends is to make them from what belongs to the bank, and that which at the time of the insolvency belongs of right to the debtor, does not belong to

> the bank.' So in the case of *San Diego County* v. *California Nat. Bank*, 52 Fed. Rep. 59, it was decided that the funds received by a national bank, which the party deposited had no authority of law to deposit, were not part of the assets to be 'ratably distributed', but must be returned in full to the rightful owner. And, again in *Massey* v. *Fisher*, 62 Fed. Rep. 958, which was a case where an indorser paid the amount of a note to a bank and took a receipt, but before he took the note from the bank, the bank failed, the substance of the decision was, that the money did not belong to the bank, but was held by it in trust; and, of course, in that case it was not part of its assets."

Although it was determined, in the *Elmira* case, that the state statute there under consideration did not fulfill these requirements and was therefore in conflict with the federal law, the decision gives recognition to the doctrine that where the lien created by the state statute arises from a relationship different than that of an ordinary creditor and gives rise to a specific lien resulting from the contract which was in being before the insolvency took place, such state statute is valid. The opinion in the *Elmira* case, *supra*, refers again to the cases cited on this point and continues as follows:

> "They all reason to demonstrate that from the particular facts stated the relation was not that of an ordinary creditor, but was one giving rise to a specific lien or rights resulting from the contract and which was in being before the insolvency took place."

In the case at bar, the Circuit Court of Appeals, for the Second Circuit, in deciding against the validity of

the state statutes herein, directs attention to two contrary federal authorities (Rec. 26).

The reasoning in both of these cases demonstrate that the Courts in both cases have applied the test specified in the case of *Davis* v. *Elmira Savings Bank*, *supra*, and have found that the Uniform Bank Collection Code gives rise to a specific lien or right resulting from the contract which was in being before the insolvency took place. The Courts, in these two cases, find that insolvency merely fixes the time when certain rights incident to the pre-existing relationship of principal and agent shall be given effect.

We quote from the first of these recent cases, namely, *United States Fidelity and Guaranty Co.* v. *National Bank of America*, 4 Fed. Supp. 569, as follows:

> "The question then resolves itself to the inquiry as to whether the money in the hands of the receiver as collected under the Indiana Uniform Bank Collection Code (Acts 1929, c. 164) was the money of the bank, and so constituted assets, or was the money held in, or impressed with, a trust, and hence not assets of the bank, which the receiver in charge could legally turn over to the Comptroller for ratable distribution under the federal Statute.
>
> There is no doubt that the National Banking Act (See 12 U. S. C. A., §21, *et seq.*) and decisions of the federal courts control in the distribution of the assets of an insolvent national bank. They, the assets, must be ratably distributed to all the creditors, but did the money in controversy constitute assets of the bank? Did the money so collected belong to the bank? Did the bank get title to the money or was it the money of plaintiff held in trust by the insolvent bank?

Defendant argues that to adopt the theory that the Statute of Indiana in controlling on the question of agency is equivalent to holding that each State in the union may adopt rules for distribution of assets of insolvent national banks. The results are not so far-reaching.

The federal rule is that a receiver of an insolvent national bank shall turn over for distribution the assets of the failed bank, not the assets, cash, or property of some other person held by such insolvent bank as agent or in trust. The federal rule does not require that money in the possession of a national bank shall be considered assets.

The Indiana State rule is that money collected as this money was shall be held by the collecting bank as agent. There appears to be no conflict between the federal statute providing for ratable distribution of assets and the decisions of the federal Courts under that Statute and the Uniform Bank Collection Code of Indiana. National banks are amendable to the laws of the State in which they operate. They are governed in all respects by the State law, except where the State law contravenes the federal law, in which case the federal law is controlling. See *McClellan* v. *Chipman*, 164 U. S. 347, 17 S. Ct. 85, 41 L. Ed. 461, where the Supreme Court of the United States lays down the rule in the following language: 'The rule being the operation of general State laws upon the dealings and contracts of national banks; the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States, or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States.'

The Court in this opinion used the following language: 'The purpose and object of Congress in enacting the national bank law was to leave such banks, as to their contracts in general, under the operation of the State law, and thereby invest them as federal agencies with local strength, while at the same time preserving them from undue State interference wherever Congress, within the limit of its constitutional authority, has expressly so directed, or wherever such State interference frustrates the lawful purpose of Congress, or impairs the efficiency of the banks to discharge the duties imposed upon them by the law of the United States.'

The State law of Indiana provides explicitly that the fund in question shall be held as agent or subagent. The federal law contains no contrary provision. To sustain plaintiff's contention is to give effect to the Indiana Code, as well as to the federal acts. To sustain defendant's contention would be to destroy the effect of the Indiana Code as applied to national banks. The constitutionality of the Indiana Uniform Bank Collection Code is not challenged. It is and was in full force and effect at the time of this transaction.

Sec. 2, Ch. 164 of the Indiana Acts of 1929, page 515, provides that 'where an item is deposited or received for collection, the bank of deposit shall be the agent of the depositor for its collection and each subsequent collecting bank shall be subagent of the depositor.'

Sec. 1 of the same act at p. 514 provides that: 'The term bank shall include any person, firm or corporation engaged in the business of receiving and paying deposits of money within this State.'

No authority has been cited and I think none can be, that directs or permits the appropriation by a

> receiver of funds held in trust or as agent for another person. These funds must be paid over by the receiver to the owner thereof. They do not constitute assets of the failed bank, do not belong to the bank, and the receiver has no right to hold them or pay them over to the Comptroller for distribution or to do anything with them except to turn them over to the rightful owner, the plaintiff in this case."

The reasoning of the opinion in the foregoing case is so clearly applicable to the case at bar as to make it unnecessary to use further words to emphasize its application.

The foregoing case was affirmed on appeal by the Circuit Court of Appeals, for the Seventh Circuit, and the opinion of the Circuit Court is reported in 71 F. (2 ) , 618. We quote from the decision of the Circuit Court of Appeals on this point as follows:

> "There is nothing in the Indiana statutes that attempts to interfere with the Comptroller's distribution of the bank's assets. The proceeds of appellee's check were not rightfully a part of its assets, and there is no effort here to secure a preference over any creditor in the distribution of the assets, or to interfere with the Comptroller in that respect. The effort on the part of the appellee is merely to recover its own property which under the laws of Indiana was held in trust by the bank as agent for appellee. We know of no federal pronouncement which holds that a national bank may include in its distributable assets to its general creditors a fund which is held by it as trustee, when that fund has been traced into the hands of the receiver. There has been a contrariety of opinion

among the State Courts as to when a trust relationship arises with respect to banks acting as collectors of commercial paper, but not as to the Comptroller's duty when once that relationship is established. The right of Indiana to establish that relationship by legislative enactment was well within its powers and is controlling here."

The other case cited in the opinion of the Circuit Court for the Second Circuit in the case at bar, on the same question is equally strong, in upholding the validity of a similar state statute. It is the case of *Royal Mfg. Co.* v. *Spradlin,* 6 Fed. Supp. 98 decided February 5th, 1934. We quote from said decision as follows:

"The mere fact that the proviso is attached to a section of the North Carolina statute dealing with the distribution of the assets of insolvent banks does not confine its operation to insolvent banks. It clearly establishes a lien in favor of one who sends by mail, etc., a draft, etc., for collection, with request that remittance be made therefor, and which is collected by charging it to the account in the bank, and failing to remit therefor, or the non-payment of a check sent in payment therefor, which lien attaches to the assets of the bank making the collection from the date of the charge, entry, or collection of any such funds. The lien, therefore, is in no wise contingent upon the insolvency of the bank. It attaches, in all cases, 'from the date of the charge, entry or collection of any such funds.' The lien exists before insolvency and subsequent insolvency does not invalidate it. Moreover, it is not attempting to prefer one creditor over another in cases of insolvency, but the purpose of the act is to make a lien against the assets of any collecting bank until it pays the proceeds of collection

made by it as agent. The language is perfectly plain. It was to put an end to court decisions making the collecting bank a mere common debtor and denying the principal the right to reach his property in the hands of his agent.

The banks receive a fee for collecting drafts sent to them. If a lien attaches in favor of the sender, if sent to a state bank, a national bank would be unable to compete in that field, with a state bank, if a similar lien does not attach against the assets of a national bank. Assuming then that the state statute is applicable to national banks, does it conflict with the acts of Congress or frustrate the purposes for which national banks are created? Congress has not legislated at all on the liabilities of a bank as collecting agent. It has provided for the distribution of the assets of insolvent banks. 12 U. S. C. A., §194. But the provisions of this statute and 12 U. S. C. A., §91 do not conflict with the North Carolina statute, nor does that statute in any way frustrate the objects for which national banks are created.

The case of *Dakin* v. *Bayly*, 290 U. S. 143, involved the construction of a state statute in regard to set-off, and the decision turned on the construction of the state statute. It is an authority also for the proposition that the collecting bank is agent, not alone to collect, but to remit the proceeds of the collection. In view of this decision and of the others cited above, and of the state statute here involved, the assets in the hand of the receiver and subject to the lien created by the North Carolina statute, and the receiver must pay it out of the assets."

The Circuit Court of Appeals, in its opinion, in the case at bar, does not attempt to indicate in what re-

spect Section 350-1, Subdivision 2, Article 19-A of the Negotiable Instruments Law of the State of New York, is contrary to the Act of Congress (12 U. S. C. A., §194).

Now, in what respect does this state statute, constituting a section of the Uniform Bank Collection Code, conflict with, or in any way, invade a field occupied by the Acts of Congress? Where, in the National Banking Act, or elsewhere, does Congress attempt to define a trust and to provide for a disposition thereof in the event of insolvency of National Banks? To be sure, 12 U. S. C. A., §194 provides by fair implication and judicial interpretation that the Comptroller of the Currency shall, upon insolvency, distribute the assets of National Banks ratably to creditors. But, the Uniform Bank Collection Code in nowise attempts to deal with the distribution of assets to creditors. Article 19-A of the New York Negotiable Instruments Law, which constitutes what is commonly known as the Uniform Bank Collection Code, states that the relation between the owner of items deposited for collection and banks receiving them for that purpose, is that of principal and agent, and establishes a lien upon the assets of the bank making the collection in favor of the owner of the item placed with the agent bank for collection. Since agents do not acquire title to property entrusted to them by their principals, the proceeds of items collected by banks, as agents, do not in any sense become the assets of the collecting bank.

It is our contention that the National Banking Act does not expressly, or by implication, assume to define the character of the relation created when a National Bank receives an item for collection while it is a going concern, nor does it attempt to deal with the question of whether, or not, such transaction amounts to a trust entitling the owner to a preference upon suspension; that the Uniform Bank Collection Code merely creates

a lien against the assets of the collecting bank based upon the contract for collection, which predicates the existence of a relationship of principal and agent from the inception between the owner of the note and the bank. We further submit that this lien comes into being before the insolvency takes place, and hence the Uniform Bank Collection Code does not seek to regulate the distribution of the assets of an insolvent National Bank.

The *Elmira* case was cited with approval, but distinguished, in *McClellan* v. *Chipman,* 164 U. S. 347, where, after stating the general rule as follows at page 356:

> "National banks 'are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the Government that it becomes unconstitutional'."

The opinion distinguishes the *Elmira* case, saying at page 360:

> "Nor is there anything in the opinion of this Court in *Davis* v. *Elmira Savings Bank, supra,* which supports the argument of the plaintiff in error. There the conflict between the State and Federal law was found to be express and irreconcilable, bringing that case, therefor, under the exception of the general rule. The opinion carefully confined the ruling there made to such a case, so

as to render it inapplicable in a case like the one now before it."

This Court had recent occasion to cite the *Elmira* case and to hold a state statute, creating a lien prior to insolvency, to be valid. We refer to the case of *Lewis* v. *Fidelity and Deposit Co. of Maryland*, 54 Sup. Ct., Rep. 848, 852, from which we quote as follows:

"Sections 50 and 52 (see 12 U. S. C. A., §194 and §91 and note) do not prohibit liens given prior to insolvency and not in contemplation thereof, whether they arise from express agreements, or are implied from the nature of the dealings between parties, or arise by operation of law. *Scott* v. *Armstrong*, 146 U. S. 499, 510, 13 S. Ct., 148, 36 L. Ed. 1059; *Earle* v. *Pennsylvania*, 178 U. S. 499, 454, 20 S. Ct. 915, 44 L. Ed. 1146. The lien here asserted arises out of an agreement executed at a time when there was no question of insolvency; nor is it restricted in its operation to the event of insolvency. It may be exercised by execution or otherwise whenever the bank refuses to pay. It resembles the lien which is enforced when seizure is made by the creditor, within four months of bankruptcy, of property claimed under an after-acquired property clause of a mortgage. *Thompson* v. *Fairbanks*, 196 U. S. 516, 25 S. Ct. 306, 49 L. Ed. 577; *Humphrey* v. *Tatman*, 198 U. S. 91, 75 S. Ct. 567, 49 L. Ed. 956. It resembles also those cases where, under the common law of distress or under a statutory lien, described by the courts as 'Inchoate' or 'dormant', a landlord, within four months of bankruptcy, seizing or levying upon whatever property was on the tenant's premises, was held to have a valid lien. *Henderson* v. *Mayer*, 225 U. S. 631, 32

S. Ct. 699, 56 L. Ed. 1233; *Richmond* v. *Bird,* 249 U. S. 174, 39 S. Ct. 186, 63 L. Ed. 543. Compare *Minnich* v. *Gardner,* 292 U. S. 48, 54 S. Ct. 567, 78 L. Ed.— decided April 2, 1934. The case at bar is unlike *Davis* v. *Elmira Savings Bank,* 161 U. S. 275, 16 S. Ct. 502, 40 L. Ed. 700, relied upon by the receiver, where a New York statute dealing with the administration of insolvent banks provided that, in the event of insolvency, the deposits of a savings banks would be entitled to a preference."

The Uniform Bank Collection Code represents a further advance in the laborious struggle of public spirited citizens and great legal minds of our country to codify and make uniform the laws of each jurisdiction, thereby clearing away the havoc and confusion of conflicting judicial interpretations. The benefit resulting to the commercial community by rendering this law certain and uniform in all jurisdictions is self-evident and needs no elaborate argument to lend it favor.

Our research discloses that the opinion of the Circuit Court of Appeals, for the Second Circuit, in the case at bar, is the sole federal authority holding the provisions of the Uniform Bank Collection Code, creating a lien in favor of the owner of the item deposited for collection, to be in conflict with the Act of Congress, 12 U. S. C. A., §194. The question seems to have been considered only in two other circuits to date, and both of them have determined in favor of the validity of the Uniform Bank Collection Code on this point. (*Royal Mfg. Co.* v. *Spradlin, supra; U. S. Fidelity & Guaranty Co.* v. *Nat. Bank of Am., supra.*)

We, therefore, believe that the validity of the Uniform Bank Collection Code should be upheld by this Court, if it is at all possible to reconcile its provisions with the Act of Congress.

The foregoing argument indicates that the lien created and the specific right arising in favor of the owner of the item placed with the bank for collection, comes into being before the insolvency takes place and is therefore not an attempt by the state to regulate the distribution of the assets of an insolvent National Bank.

We, therefore, respectfully submit that there is no conflict between the Uniform Bank Collection Code and the Act of Congress, and that therefore the decision of the Circuit Court of Appeals on this point should be reversed.

## ARGUMENT II.

**The construction of the Circuit Court of Appeals for the Second Circuit to the effect that the appellant has been unable to overcome the difficulty of tracing an identifiable sum of money held on trust when the bank closed its doors, is erroneous and is based on a misconception of the views of this Court, as expressed in the case of *Blakey* v. *Brinson*, 286 U. S. 254.**

In *Blakey* v. *Brinson, supra,* this Court determined that a debtor and creditor relation existed throughout between the bank and its depositor in said case, but it appears, in the opinion, that this Court apparently does not disagree with the Circuit Court of Appeals, for the Fourth Circuit, in its reasoning wherein it sought to apply the "as if" doctrine. We quote from the decision in the case of *Blakey* v. *Brinson, supra:*

> "The Court below thought that the legal consequences to be attributed to the debiting of the account with the supposed purchase price of the bonds was the same as if the respondent had cashed a

> check for the amount and had then proceeded to hand the money back to the bank under a specific agreement between him and the bank that the money was to be held as a special fund, for the sole purpose of completing the purchase. This view is not without support. See *Davis* v. *McNair,* 48 F. (2d) 494; *State* v. *Grills,* 35 R. I. 70, 75; 85 Atl. 281; *Northwest Lumber Co.* v. *Scandinavian American Bank,* 130 Wash., 33; 225 Pac. 825; *State* v. *American Exchange Bank,* 112 Neb. 834; 201 N. W. 895."

After citing the contrary authorities on this point, this Court indicates, in said opinion, a passive approval of the "as if" doctrine where the facts warrant the inference that a debtor and creditor relationship was not intended, and the establishment of a trust fund was contemplated, by expressing its view with respect to such a situation as follows:

> "Such a procedure, if actually carried out, might afford a basis, which is lacking here, for the inference that respondent, no longer content with the role of creditor, had sought to establish a trust fund."

In the case of *Davis* v. *McNair, supra,* it was clearly shown that to support a trust, it is not necessary to have augmentation in the sense of new money being brought into the bank from the outside where the facts warranted the inference that the relation of the bank towards money which it theretofore held on general deposit was changed from that of owner to that of agent or trustee. In said case, the Court held that by what was done the relations of the parties with respect to the funds were so changed that thereafter the deposit was in the nature of a special fund, having the

trust features of a special deposit. Such special deposit, though not segregated and set aside, and though it be commingled with the remaining funds of the bank, does not lose its trust features because it is confounded in the general mass. The modern rule holds that to accomplish the ends of justice, a trust will be impressed upon the entire mass.

*Frelinghuysen* v. *Nugent,* 36 Fed. 229, 239;
*Peters* v. *Baine,* 133 U. S. 670;
*Brennan* v. *Tillingast,* 201 Fed. 609;
*Quin* v. *Earle,* 95 F. 728, 731;
*Central Nat. Bank* v. *Conn. Mutl. Life Ins. Co.,* 104 U. S. 54, 26 L. Ed. 693;
*Knatchbull* v. *Hallett,* 13 Ch. Div. 696; notes 32 Am. St. Rep. 129; L. R. A. 1916, C. 31;
*Poisson* v. *Williams,* 15 F. (2d) 582;
*Schumacker* v. *Harriet,* 52 F. (2d) 817;
*Tucker* v. *Newcomb,* 67 F. (2d) 177.

The Circuit Court of Appeals, for the Fifth Circuit, carefully expressed itself in a well reasoned decision on this question in the case of *City of Miami* v. *First National Bank of St. Petersburg,* 58 F. (2) 561, which said decision was cited with approval by this Court in the case of *Dakin* v. *Bayly,* 290 U. S. 143.

The same case came up for consideration a second time before the said Circuit Court after judgment, and in the second opinion the Court reversed its former position, basing its new decision on the ground that no identifiable *res* had been established upon which the trust could rest. The second decision of the Circuit Court of Appeals, for the Fifth Circuit, evidently was rendered without knowledge of the fact that this Court had, in the case of *Dakin* v. *Bayly, supra,* cited its first opinion with approval.

A comparison of the latter opinion in the said case of *City of Miami* v. *First National Bank of St. Petersburg,* 69 F. (2d) 346, with the former opinion in the same case discloses that the reasoning in the second opinion cannot be reconciled with the reasoning of the first. Although the first opinion carefully and exhaustively considers every element involved, it contains no hint that an all destroying principle, in the form of a requirement of an identifiable *res*, lurked in the background. This question, of an identifiable *res,* upon which the second opinion is based is also one of the grounds upon which the Circuit Court of Appeals, for the Second Circuit, in this case bases its denial of relief to the plaintiff. It conflicts with the "as if" doctrine passively approved by this Court in the case of *Blakey* v. *Brinson, supra,* and has served to add even greater confusion to conflict of views which previously existed on this point in several circuits.

In the case at bar, it is conceded that the relationship between the appellant, OLD COMPANY'S LEHIGH, INC., and THE FIRST NATIONAL BANK IN MAMARONECK was that of agent and principal and that at no time was the relationship between them that of creditor and debtor. The parties are presumed to have contracted with reference to the state statute, known as the Uniform Bank Collection Code, fixing their relationship as that of principal and agent, and therefore whatever the agent bank collected on the note for its principal was received by such agent bank as the property of the principal and held in trust for the principal.

The sole question remaining, therefore, for determination, is whether the doctrines and principles of equity so carefully and laboriously developed by the Courts in this country and in England in order to mete out justice in accordance with the dictates of good

conscience, in situations where the law does not provide an adequate remedy, should be allowed to apply upon the state of facts existing in the instant case, or whether these principles of equity should be ignored because of the Act of Congress (U. S. C. A. § 194). We respectfully submit that there is no command, either express or implied, in the Act of Congress providing for ratable dividends, which compels the Courts to disregard the principles of equity that would apply if the litigation involved the agent bank and its principal as the sole parties.

This Court has held in the case of *Dakin* v. *Bayly*, 290 U. S. 143, that the relationship and the rights of the parties in a case of this character becomes fixed at the moment of insolvency. The receiver of the bank, therefore, is in no position to assert greater privileges and immunities than the bank itself could have asserted had there been no insolvency.

If this controversy were solely between the appellant and the Mamaroneck Bank, there can be very little doubt that the Court would hold that when the Mamaroneck Bank accepted the check of the maker of the note drawn against the account of the maker and surrendered the note to the maker, that, in the eyes of a Court of equity, the situation would be considered as no different than that which would have arisen if the maker of the note had gone through the formality of withdrawing the amount of the note, namely, Three Thousand and Fifteen ($3,015.00) Dollars and had immediately paid said sum of money over the counter to the teller in payment of said note. The mere fact that such formality was not gone through does not prevent a Court of equity from regarding and treating that as done which in good conscience ought to have been done.

> "The true meaning of this maxim is, that equity will treat the subject matter of a contract, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been, not as they might have been, executed." *1. Pomeroy's* Equity, 2nd Edition Sec. 364 (note) Section 373.

At the time the maker of the note, in the instant case, drew his check to the order of the bank, he had on deposit more than sufficient to pay the amount of the note. Equity looks at the substance rather than the form of things. Since equity considers that done which in good conscience ought to have been done, and since the bank was then open for business, the result was the same as if the maker of the note had withdrawn the cash and paid it back over the counter in payment of the note, in which event the amount of cash delivered in payment of the note over the counter would have constituted monies belonging to the principal, who had left the note with the bank as its agent for collection. This fund would have represented an identifiable sum of money which passed to the receiver when the bank closed its doors and augmented the assets passing to the receiver; and though this fund was commingled with the other monies of the bank, the trust would not be destroyed, but would be impressed upon the entire mass.

*Butler* v. *Western German Bank,* 159 Fed. 116;
*Frelinghuysen* v. *Nugent, supra;*
*Peters* v. *Baine, supra;*
*Brennan* v. *Tillingast, supra;*
*Quin* v. *Earle, supra;*

*Central Nat. Bank* v. *Conn. Mut. Life Ins. Co., supra;*
*Knatchbull* v. *Hallett, supra;*
*Poisson* v. *Williams, supra;*
*Schumacker* v. *Harriet, supra;*
*Tucker* v. *Newcomb, supra.*

After applying the principles of equity upon the facts in the case at bar there remains no difficulty of tracing into the hands of the receiver an identifiable *res* upon which the trust is to rest. The identifiable trust *res* would be present if the check had been cashed and the cash paid over the counter to teller; it is likewise present though the formality of cashing the check was not gone through since equity considers that done which should have been done in good conscience.

The fallacy that to support a trust there must be augmentation in the sense that new money is to be brought into the bank from the outside where the relation of the bank towards money which it heretofore hold on general deposit was changed from that of owner to that of agent or trustee, was exposed in the case of *Davis* v. *McNair,* 48 F. (2d) 494. We quote from said decision as follows:

> "By that transaction, the bank ceased to be the plaintiff's debtor for the amount which previously had been on deposit subject to check, and in effect accepted from the plaintiff the same amount in cash, to be held by it, not as its own property, but as an agent charged with the duty or trust to use it in paying for the bonds to be purchased, and of keeping the amount so received separate from its general assets. An effect of the bank's failure to keep the sum of money so received by it segregated from its own assets and permitting

> it to be commingled with its general funds was that the sum was added to funds then owned by the bank, and the plaintiff became entitled to have the amount of his money delivered to the bank as agent withdrawn from the bank's general funds with which it was commingled and used in the way the bank was obligated to use it. The assets of the bank having passed into the hands of the receiver, the defendant, increased by the amount of plaintiff's money wrongfully commingled therewith, those assets are held by the defendant subject to a preferential claim in favor of the plaintiff for the amount of his money which was so wrongfully commingled with funds owned by the bank."

The equities in favor of the appellant, in the instant case, are far stronger than those that existed in the aforecited case of *Davis* v. *McNair, supra,* because in the case cited a debtor and creditor relationship had previously existed between the bank and its depositor, while in the instant case, the appellant and the Mamaroneck Bank were at no time on a debtor and creditor relationship, but acted throughout as principal and agent.

We have heretofore pointed out that the doctrine in the case of *Davis* v. *McNair, supra,* was considered by this Court in the case of *Blakey* v. *Brinson, supra,* and that the "as if" doctrine there set forth was not disapproved by this Court. If the "as if" doctrine is to be given recognition, the facts in the case at bar justify its application because it is almost inconceivable that a state of facts could arise in any case where the equities merit the application of the "as if" doctrine to a greater extent than the facts in the instant case do. The unfortunate plight of the owner of a note, who is compelled willy-nilly, by an arbitrary rule of law,

to accept in lieu of the obligation of the maker of a note the obligation of a debtor whom he did not choose, and whom he did not even know, is illustrated to perfection in the instant case. The owner of the item for collection ought to at least be accorded the right, which a principal usually has, to have some say as to whether his agent and trustee for collection shall become his simple debtor for payment.

The appellant, in the case at bar, comes into Court with clean hands and merits the favorable consideration of the Court on the request that the Court apply the equitable principle of considering that done which in good conscience ought to have been done. Therefore, the failure of the depositor to actually cash the check and turn the money back over the counter should be disregarded and the transaction considered the same as if that had actually been done.

On applying this principle of equity, we find that by the acceptance of the check and the surrender of the note, the sum of Three Thousand and Fifteen ($3,015.00) Dollars out of the general deposit of the maker of the note immediately became a special deposit constituting trust monies belonging to the appellant. There is no greater difficulty in identifying and tracing this special fund than would have existed had the cash actually been paid over the counter and returned, and was then commingled with the general funds of the bank, in which event the entire mass would have been impressed with a trust. The effect is the same because in equity the plaintiff became entitled to have the amount of his money in the possession of the bank withdrawn from the general funds with which it was commingled and used in the way the bank was obligated to use it. Since the assets of the bank have passed into the hands of the receiver, augmented by the amount of plaintiff's

money wrongfully commingled therewith, those assets are held by the receiver subject to a trust in favor of the plaintiff for the amount of his money which was so wrongfully commingled with the funds owned by the bank.

Probably, the most complete analysis of the "as if" doctrine, and the reasoning in support thereof, is contained in the opinion of the Court in the case of *Northwest Lumber Company* v. *Scandinavian-American Bank of Seattle, et al.*, 130 Wash. 33; 225 Pac. 825; 39 A. L. R. 922. The facts were as follows:

The bank was the Trustee for bondholders; the Lumber Company was required prior to each due date of principal and interest to deposit with the bank sufficient funds to pay maturing principal and interest. On June 24th, 1921, the Lumber Company had on deposit in said bank subject to its general checking account a sum in excess of $85,000.00. That day it forwarded to the said bank its check for $5,220.00 to meet payments on outstanding obligations due July 1st, 1921. It sent a letter with a check explaining that the purpose of the check was to pay six months' interest on its bond. The check was turned over by the cashier to the person having charge of the trust department of the bank. The check was not marked paid or cancelled and the lumber company's general account was not charged with amount of same. On June 30th, 1921, prior to due date of the interest, the bank was taken over by the state supervisor of banking. The undertaking on the part of the bank to meet the interest payment was not recognized by the supervisor and the lumber company was compelled to make payments through other channels. The Lumber Company presented a claim for preferential payment from assets of bank, and this was not allowed by supervisor. Suit was instituted to en-

force a preference. Judgment was in favor of the Lumber Company in the lower Court and the supervisor appealed. The Appellate Court on appeal affirmed the judgment of the lower Court and in the opinion rendered said:

> "Tested by the rules above stated, it is at once apparent that, had the Lumber company, instead of sending its check to the bank for the amount to become due on the interest payment, sent to the bank the cash for the amount due, it would, under the circumstances shown, have constituted a special deposit which it could have reclaimed in its entirety after the bank passed into the hands of the supervisor of banking, and this notwithstanding the bank might have intermingled the money with its general cash deposits. A like result would have followed had the Lumber Company required its messenger carrying the check to the bank to exact payment of the check, and, after payment, leave the money so received with the bank as a deposit to pay the maturing interest obligation when it became due. The difference between transactions such as these and the transactions in question, it seems clear, is one of manner rather than one of legal effect. By presenting the check to the bank, and directing what disposition should be made of the fund represented by it, the Lumber company sought to collect this part of the debt due it from the bank and deposit the fund for a special purpose. In other words, it sought thereby to change a part of its general deposit into a special deposit. The bank, by accepting the check with knowledge of the purposes of the Lumber company, consented to the change. It thereby lost its right of general lien on the fund, its right of off-set against it, its

title thereto, its right to use it for its own purposes, and had no right with respect to it, other than to pay it out in accordance with the directions of the Lumber company. While the Lumber company could have changed its directions with respect to the fund prior to its actual disposition in accordance with the directions given, the bank had no such right. Its sole right and duty was to carry out the instructions given it by the Lumber company. It follows from these considerations, we think, that the relation of the parties with respect to the fund were changed by the transaction between them; that their relation thereafter with respect to it was not that of debtor and creditor, but that of trustee and *cestui que* trust. As between the immediate parties thereto, we conclude that it cannot be successfully contended that the Lumber company was not entitled to claim the fund as a special deposit.

What reason is there for contending that the fund is not a special deposit as between the Lumber company and the general creditors of the bank? The first of the reasons suggested by the supervisor he states in the following language:

> 'The bank, of course, may be indebted to the plaintiff; but what is the property, the title to which is in the plaintiff? Nothing except the unused check with the letter. To the return of these the plaintiff is entitled. The letter and check were to serve a specific purpose, which, of course, was frustrated by the closing of the bank prior to July 1, 1921. The check coming into the hands of the liquidator of the bank in the same condition as delivered by the plaintiff to the bank, and the check not having been cashed, and no funds substituted in lieu of the check, the plain-

tiff, of course, cannot prevail except as to the return of its check.'

But this reasoning, in our opinion, overlooks the substance of the transaction. The check, it is true, was not marked as paid, nor did the bank set apart from its general funds the amount of money called for by the check into a special fund. But these acts, had they been carried out, would have been here nothing more than evidence of the transaction. The check and letter did not as between the parties represent value. They were mere directions from the one party to the other as to property which in itself alone had value. The subsequent insolvency of the bank in no way changed the original nature of the check and letter, and they do not now have value. To allow a recovery of them only would be to allow a recovery of the shadow, and not the substance. But the argument mistakes the real question at issue. That question is: was there such a segregation of this particular fund from the moneys of the bank as to withdraw it from the general lien of the general creditor? If there was such a segregation, it matters little what means were taken for its accomplishment. Nor do we think it accurate to say that the check was not cashed. Plainly it was cashed as between the parties as to all intents and purposes, by the mere issuance and acceptance of the check with that understanding. The pertinent matter in the objection is the fact that there was no actual segregation of the fund—no separation of it from the bank's general fund. But this objection is answered by the rule with respect to the intermingling of funds. Since there can be a recovery where the bank intermingles its special funds with its general funds, so, on the like

principle, can there be a recovery where the bank leaves a special fund intermingled with its general fund after it becomes its duty to segregate it. The case of *Raybor* v. *Scandinavian-American Bank*, 122 Wash. 150, 210 Pac. 499, 25 A. L. R. 716, cited in support of the proposition that nothing but the check and letter can be recovered, lends no support to the proposition. In that case the checks under consideration were checks drawn on a solvent bank. They represented a solvent fund, and had value in the hands of the holder, and a recovery of the checks was equivalent to a recovery of the fund, which is not so in the present instance.

The second reason urged is that the situation of the Lumber Company is not different from the situation of other creditors of the bank who held uncashed checks at the time it was closed by the supervisor. But we think there is a difference between the situations. The Lumber Company presented its check at a time when the bank was a going concern, when it was open for the transaction of business, and its check was accepted and (in legal effect) cashed by the bank. In the other instances there was no presentation during the business life of the bank, and no cashing of the checks. The holders of the checks were mere general creditors of the bank, and are not in positions such as to entitle them to claim that there was a withdrawal of the sums represented by the checks from the general funds of the bank and deposited as special funds.

As a final reason against a recovery, it is urged that there was by the transaction no augmentation of the assets of the bank. The fact here assumed is undoubtedly true as applied to the general assets of the bank; that is to say, it is true in the sense

that the bank held no greater assets at the completion of the transaction than it held at its beginning. But it is not our understanding that this is the principle upon which the doctrine of augmentation rests. The equitable right to follow misapplied property into the hands of the parties receiving it depends upon the ability of identifying it, in specie, or the ability of identifying the property with which it has been confused, or into which it has been converted. If this cannot be done there can be no recovery, even though it be shown that the general assets of the estate have been increased to the amount and value of the property. The rule as applied to money which has been intermingled with other money thus means that it must be shown that the mass of money from which it must be taken has been increased by the amount of money which has been misapplied, not that it must be shown that the general assets of the possessor of the money have been increased. In the instant case there is a showing that the money which came into the hands of the supervisor on the insolvency of the bank was greater by the amount of the check than it would have been had the bank performed its duty and made the actual segregation, and in consequence an augmentation of that mass."

In the case at bar, the money which came into the hands of the receiver was augmented by the amount of the special fund belonging to the plaintiff in the sum of Three Thousand and Fifteen ($3,015.00) Dollars and was greater by that amount than it would have been had the bank performed its duty and made an actual segregation. The receiver of the bank cannot assert greater rights than the bank itself could have claimed because the rights of the parties became fixed at the

moment of the insolvency. The *res* upon which the trust is to rest has been identified because equity regards this special fund as having come into existence despite the fact that the formality of cashing the check and paying the money back over the counter was not gone through. Since this special fund was commingled with the general funds of the bank, the entire mass of money is impressed with a trust in favor of the appellant for the amount of this special fund, so wrongfully commingled therewith, and which has passed into the hands of the receiver upon the insolvency of the bank.

## CONCLUSION.

It is respectfully submitted that an identifiable *trust res* has been traced into the hands of the receiver representing part of the total cash funds held by the receiver and that the Circuit Court of Appeals, for the Second Circuit, was in error on that point.

It is likewise respectfully submitted that the Circuit Court of Appeals for the Second Circuit was in error in holding that the provisions of Section 350-1, Subdivision 2, Article 19-A of the New York Negotiable Instruments Law, conflicts with the provisions of the Act of Congress (12 U. S. C. A. § 194). Therefore, we believe that that part of the decision of the Circuit Court of Appeals, for the Second Circuit which affirms the order of the District Court dismissing the first and second causes of action of the appellant should be reversed.

Respectfully submitted,

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*Attorney for Petitioner.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1934.

No. 340

OLD COMPANY'S LEHIGH, INC.,
*Petitioner,*

—against—

HENRY E. MEEKER, as Receiver, for the First National Bank in Mamaroneck, THE FIRST NATIONAL BANK IN MAMARONECK, and R. G. BREWER, INC.,
*Respondents.*

## REPLY BRIEF OF PETITIONER.

ISRAEL H. MANDEL,
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JOSEPH G. M. BROWNE,
*Attorney for Petitioner.*

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## *REPLY BRIEF OF PETITIONER.*

### *Statement.*

This reply brief by the petitioner is being filed in answer to the brief of the respondent receiver on which brief the attorneys for the Comptroller of the Currency appear of counsel. The petitioner, in this reply brief, will avoid arguing further on the question of the validity of Section 350-1, Subdivision 2, Article 19-A, of the New York Negotiable Instruments Law, commonly known as the Uniform Bank Collection Code, since petitioner believes that that issue has been fully covered in Argument I of the petitioner's original brief herein.

With respect to this question we merely wish to comment briefly upon the reversal by the Circuit Court of Appeals of the District Court decision of

*Royal Mfg. Company* v. *Spradlin*, 6 F. Supp. 98, which reversal was not reported at the time of the filing of the original brief by the petitioner herein. We believe that the reversal by the Circuit Court of the *Spradlin* case does not alter the force of the reasoning urged by the petitioner herein in Argument I of the original brief. An examination of the North Carolina Statute which is recited in full in the Circuit Court opinion indicates that it is materially different from the statute known as the Uniform Bank Collection Code which is involved in the instant case. In fact, the opinion of the Circuit Court indicates that the North Carolina Statute, under consideration in said case, is composed of twenty-three subsections, all of which relate to the liquidation of state banks. The Uniform Bank Collection Code which is involved in the instant case, on the other hand, deals with the bank as a going concern and creates a lien based upon the contract of collection, which lien comes into being before the insolvency takes place. The Uniform Bank Collection Code, therefore, does not attempt to regulate the distribution of the assets of an insolvent national bank and therefore does not conflict with the Act of Congress (12 U. S. C. A., § 194).

In filing this reply brief, the petitioner's main purpose is to clarify the principles of equity which should govern the determination of this case, since the petitioner believes that these well settled principles of equity have been completely overlooked by the Court below in this case, and have been erroneously conceived in the respondent's brief.

## ARGUMENT I.

**Disregarding, for the sake of the argument, the question of the validity of the Uniform Bank Collection Code, the claim of the petitioner which is urged on the equity side and is based on pure equity, cannot be defeated by the purely legal rights of the ordinary creditors of the bank.**

The respondent's statement (p. 5) that all issues must be resolved in favor of the bank receiver does not apply in the instant case, since the instant case does not come before this Court after trial but only upon the pleadings of the petitioner. The petitioner is entitled to all favorable inferences that might be drawn from its pleadings, and therefore all doubts at the present time must be resolved in favor of the petitioner and not in favor of the bank receiver. It is not until trial is actually had that any presumption could arise that the petitioner had or had not failed to meet the burden of proof by a fair preponderance of the evidence.

The respondent lightly brushes aside the arguments of the petitioner in favor of the application of the "as if" doctrine and claims that it would be resorting to fiction to apply that doctrine. Respondent further asserts that "this is not a novel contention" (p. 12). However, neither is it a novel contention to urge a court of equity not to consider that done which in good conscience ought to be done by the simple accusation that its relief is based on the resort to fiction. The history of the development of equity indicates that the courts of equity, from the times of the early Chancellors, have never been persuaded against applying the Divine principles of

morality, in cases where the law did not afford an adequate remedy, because the cry was raised that it would be resorting to fiction to look at the substance of things rather than the form.

It is worth noting, at this point, that the respondent does not hesitate to urge a more obvious fiction, in his effort to defeat the petitioner's rights, namely, the fiction of transforming the undisputed relationship between the petitioner and the collecting bank from that of principal and agent, trustee and *cestui que trust,* to that of ordinary debtor and creditor.

The Circuit Court of Appeals, for the Fifth Circuit, in its first decision in the case of *City of Miami* v. *First National Bank of St. Petersburg, Florida,* 58 F. (2d) 561, highly commends the dissenting opinion of Mr. Justice Faris, in the case of *Larabee Flour Mills* v. *First National Bank of Henryetta, Okla.* (C. C. A.—8th Dist., June 12, 1926), 13 F. (2d), page 332. We believe that Mr. Justice Faris, in said dissenting opinion, tore away the veil of confusion created by the failure of some of the Federal courts to apply the well settled principles of equity, in cases of this character, when a bank receives a draft for collection and remittance from a stranger, who is not a depositor of the collecting bank.

We cite from the dissenting opinion of Judge Faris as follows:

> "But the state courts quite generally hold that, when a bank receives a draft for collection and remittance, and of course from a stranger, who is not a depositor of the collecting bank, and accepts in payment for such draft a check drawn on itself, a trust fund in favor of the drawer is thereby created, which

fund may be followed and recovered in full from the receiver of such bank, if the latter shall become insolvent. *Hawaiian Pineapple Co.* v. *Browne*, 69 Mont. 140, 220 P. 1114; *State National Bank* v. *First National Bank*, 124 Ark. 531, 187 S. W. 673; *Goodyear Tire and Rubber Co.* v. *Bank*, 109 Kan. 772, 204 P. 992, 21 A. L. R. 677; *Bank of Poplar Bluff* v. *Millspaugh* (Mo. Sup.) 281 S. W. 733.

On the other hand, the federal courts quite generally hold that the test of recovery as a preferred claim is whether by the transaction the assets of the insolvent bank, passing into the hands of the receiver, are increased; and they reach the conclusion that payment of such a draft by a depositor of the collecting bank, by a check of such depositor on his account in the collecting bank, does not serve to increase the assets coming into the receiver's hands, but merely operates to make the drawer the creditor of the bank instead of the drawee.

That the latter view is obviously sound when the drawer is already a depositor—that is, a creditor of the collecting bank—is borne out both by reason and authority. For, when a depositor of a bank draws a draft and deposits it for collection and credit, the relation of debtor and creditor is created between such a drawer and the collecting bank, and that title of the proceeds of the draft passes to the bank. Thereafter, the matter is one of ordinary debt, and such a debt is not a preferred claim.

*But when a stranger draws a draft for collection and remittance of the proceeds to the drawer, no such relation of debtor and creditor is created, and the title to the proceeds of the draft does not pass to the bank. Nyssa Arcadia Drainage Dist.* v. *First National Bank* (D.

C.) 3 F. (2d) 648; *Commercial Bank* v. *Armstrong,* 148 U. S. 50, 13 S. Ct. 533, 37 L. Ed. 363; *Sweeney* v. *Easter,* 1 Wall. 166, 17 L. Ed. 681. On the contrary the cases seem to hold that the bank becomes an agent and trustee for the drawer, and in such relation, it takes and holds the proceeds of the draft. *If without title and against the will of the drawer, who is its principal and cestui que trust, the bank may pocket this trust fund and pass it on to its creditors, the situation would seem novel and anomalous, and opposed to all general principles governing agency and trusteeship. Holder* v. *Western German Bank,* 136 F. 90, 68 C. C. A. 554.

A great majority of the cases wherein the federal court doctrine is laid down are cases in which the relation of debtor and creditor, as between the drawer and the collecting bank, already existed, yet many of these cases unnecessarily lay down the doctrine of the necessity of an augmentation of assets. *Beard* v. *Independent, etc., Dist.,* 88 F. 875, 31 C. C. A. 562; *Clark, etc., Co.* v. *American Bank,* 230 F. 738; *City Bank* v. *Blackmore,* 75 F. 771, 21 C. C. A. 514, *Nyssa etc., District* v. *Bank* (D. C.) 3 F. (2d) 648; *Franklin, etc., Bank* v. *Beal* (C. C.) 49 F. 606; *Jewett* v. *Yardley* (C. C.) 81 F. 920." (Italics ours.)

The learned Justice then points out that the later cases have abandoned the doctrine that no recovery can be had where the defaulting trustee commingles the trust fund with his other assets and proceeds to discuss the augmentation rule, as follows:

"The rule which requires an augmentation of assets as a condition precedent to putting in motion the numerous equities conceded to

exist in favor of the drawer of a draft sent for collection and returns was seemingly announced originally without setting out any definite or satisfactory legal foundation, or any reason at all, for its existence. If it rests, as was said years after it was announced, upon the doctrine that one who has many equities in his favor, stands in no better case than one who has but one equity in his favor (*Empire State Surety Co.* v. *Carroll County,* 194 F. loc. cit. 603, 114 C. C. A. 435), *I am, with much regret, unable to agree; for, while the claims of the appellant and ordinary creditors here are being urged on the equity side, yet the right of the drawer is a pure equity and the rights of the ordinary creditors between whom and the appellant the contest actually is, are purely legal. The latter is trying to fasten a trust on a definite fund, while the former, as ordinary creditors, are trying to recover money due them from their creditor, the insolvent bank, out of any fund possible.*

It is conceded that the great weight of authority in the Federal courts, even disregarding what I may call debtor and creditor cases, which I do not regard as in point, is in favor of the rule that recovery depends on whether there has occurred augmentation of assets through the transaction which occurred, and that when a draft held by a bank for collection is paid by the drawee with a check on the collecting bank, there is no such augmentation of assets, but a mere switching of creditors. *But I am not able to see how this fact has any such legal relevancy as to put the equities in favor of the strange drawer on a parity with those of the ordinary depositors of the bank. The latter became the willing creditors of the bank, the former, if he does become a creditor,*

*becomes such without his consent and against his expressed intent.* Many fairly well settled principles announced in the very cases which require such augmentation, and in many others besides, seems utterly at variance with the above rule. Some of these principles, so at variance are: (a) That in case of a draft deposited for collection and returns no title ever passes to the collecting bank (*Nyssa, etc., District* v. *Bank, supra*); (b) That the bank takes the collection as an agent for the drawer (*American Can Co.* v. *Williams,* 178 F. 420, 101 C. C. A. 634; *Clark etc. Co.* v. *Bank* (D. C.), 230 F. 738); (c) That it takes the collection as the trustee of the drawer (*Holder* v. *Bank,* 136 F. 90, 68 C. C. A. 554); (d) That the collecting bank is bound to accept only legal tender, to wit, money, in payment of such a draft (*Bank* v. *Fed. Reserve Bank* (C. C. A.), 6 F. (2d) 339; *Fed. Reserve Bank* v. *Malloy,* 264 U. S. 165, 44 S. Ct. 296, 68 L. Ed. 617, 31 A. L. R. 1261; *Bradley Lumber Co.* v. *Bank* (C. C. A.), 206 F. 41), and (e) That, if it mingles such a fund with its own funds, the proceeds may yet be followed (*Peters* v. *Bain,* 133 U. S. 670, 10 S. Ct. 354, 33 L. Ed. 696), and *ceteris paribus,* recovered.

I am led to believe that the error (if it is an error, and I cannot see it otherwise) has arisen from too closely following debtor and creditor cases, in which the doctrine requiring augmentation of assets was early, but unnecessarily announced, and by the laying down of an erroneous initial premise, even if, *arguendo,* the correctness of the legal conclusion that there must be an augmentation of assets, be conceded. *This error is, I submit, that the courts which have squarely so held* (*Anheuser-Busch Ass'n* v. *Clayton,* 56 F. 759, 6 C. C. A.

108; *American Can Co.* v. *Williams*, 178 F. 420, 101 C. C. A. 634; *Clark, etc., Co.* v. *Americus Bank, supra; Anadorko, etc., Co.* v. *Litteer* (D. C.), 300 F. 222) *have considered the situation which existed as of the time when the draft was paid to the collecting bank by a check of the drawee on such bank, and not the situation which existed when the receiver took over the assets; that is to say, the bank, while it was a going concern, paid the drawee an amount of its debt due him equal to the draft it held for collection against him, and therefore, with such transaction, so far as the receiver was concerned, he was not concerned at all, since his rights did not attach till after the transaction between the collecting bank and the drawee was a closed incident.*" (Italics ours.)

The respondent argues that the equities of the depositors are at least equal to those of the petitioner (p. 28). This is the only reason urged as to why equity should not consider that done which in good conscience ought to be done. In other words, if the depositors of this insolvent national bank do not have equities equal to those of the petitioner, a court of equity would consider the transaction as if the maker of the note had actually cashed his check and paid the cash back over the counter to the teller, in which event the said amount would have constituted an identifiable trust *res* which had passed into the hands of the receiver and which belonged to the petitioner. We, therefore, believe that the determination of the instant case, in favor of the petitioner, depends entirely upon the comparison of those equities which exist in favor of the petitioner with those claimed in favor of the depositors of the insolvent bank.

We respectfully submit that the depositors are but ordinary creditors of the insolvent bank. There is no fiduciary relationship existing between the depositors and the bank, and therefore no equities exist herein in favor of the depositors. Their rights are purely legal rights based upon their debtor and creditor relationship with the bank. On the other hand, the rights of the petitioner herein are purely equitable rights arising out of the fiduciary relationship of principal and agent existing between the petitioner and the bank.

The opinion of the Circuit Court, in the case at bar, expressly holds that whatever the bank collected upon the note was held in trust for the petitioner and, if traced into the hands of the receiver, might be reclaimed (T. 25).

Furthermore, with respect to the second cause of action, had the agent collecting bank performed its duty and had held the note of its principal, the petitioner herein, until its date of maturity, January 16th, 1933 and had not released it two days prior thereto on January 14th, the principal could have reclaimed from the receiver the original note which would have passed into the receiver's hands since the bank was not opened for business on January 16th, the date of the maturity of the note. In substitution for the note, the wrongdoing agent has received from its depositor a check to itself for like amount and has discharged its liability to its depositor for that amount. By that transaction the collecting bank ceased to be its depositor's debtor for that amount so that the general deposit credited to its depositor was accordingly reduced. It could not in turn become the mere debtor of the owner of the note because the contract for collection and remittance did not contemplate a debtor and creditor relationship but on the contrary imposed

the strict fiduciary relationship of principal and agent, trustee and *cestui que trust.* Whatever bookkeeping entries the bank might be authorized to make with respect to its own depositors, it certainly could not by a mere bookkeeping entry transform itself from agent and trustee to that of a simple debtor, as far as its principal was concerned. Equity should intervene in favor of the innocent principal. In equity, the principal is the equitable owner of this special fund. The depositors are ordinary creditors whose rights to this special trust fund are no greater than those of the wrongdoing trustee, the agent collecting bank.

The argument of the respondent (p. 28) that the "as if" doctrine should not be applied in this case because it was not applied in the case of *Blakey* v. *Brinson,* 286 U. S. 254, is completely answered by the fact that the *Blakey* case dealt with the rights of a bank and its depositor between whom a debtor and creditor relationship had existed from the inception, while, in the case at bar, no debtor and creditor relationship had ever existed, or was ever contemplated between the petitioner and the bank, and, on the contrary, the relationship was that of principal and agent, trustee and *cestui que trust* from the very inception. It must also be remembered that in the *Blakey* case this Court indicated no disapproval of the "as if" doctrine if the procedure followed by the parties established a basis for the inference that the establishment of a trust fund was contemplated.

It is, beyond dispute, that the equities of the petitioner are superior to any equities in favor of the depositors, since no equities exist in favor of the depositors, their rights being purely legal rights. However, if, for the sake of the argument, we should

assume that there are equities existing in favor of the depositors, we cannot depart from the fact that such equities are, at the most, only equal to the equities existing in favor of the petitioner. Though equal equities be granted to the depositors and other creditors of the bank, the petitioner is still entitled to prevail because where the equities are equal, the first in time will prevail.

*Salem Trust Co.* v. *Manufacturers' Finance Co.*, 264 U. S. 182;
*Commercial Investment Trust* v. *Bay City Bank*, 62 F. (2d) 735;
*Judson* v. *Corcoran*, 17 How. 612, 15 L. Ed. 231.

There is no question that the equities in favor of the petitioner arose at the moment that the bank accepted the check of its depositor and released the note of the petitioner to its depositor. At that moment, the transaction became complete and all equities in favor of the petitioner immediately came into being. At that time, the bank was a going concern. No equities at that time existed in favor of its depositors because its depositors were ordinary creditors of the bank and the bank was open for business. Any equities that might arise in favor of the depositors of the bank did not come into being until the subsequent closing of the bank and the consequent transfer of its assets to the receiver took place.

If we are to conclude that the rights, in equity, of the depositors who are ordinary creditors of the bank are equal to those of the petitioner towards whom the bank stood in a fiduciary capacity, we must first obliterate completely, from our minds, the

glorious history of equity beginning from the time of the early Chancellors, who laid down the foundations of equity, and who were constantly appealing to and governed by the principles of absolute right, guided by their conscience, and inspired by a lofty morality, based upon the Divine principles of what is right and what is wrong.

***We, therefore, respectfully submit that the superior equities existing in favor of the petitioner warrant the application by a Court of Equity of the "as if" doctrine, in favor of the petitioner, and consequently there has been traced into the hands of the receiver an identifiable trust res belonging to the petitioner.***

Respectfully submitted,

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JOSEPH G. M. BROWNE,
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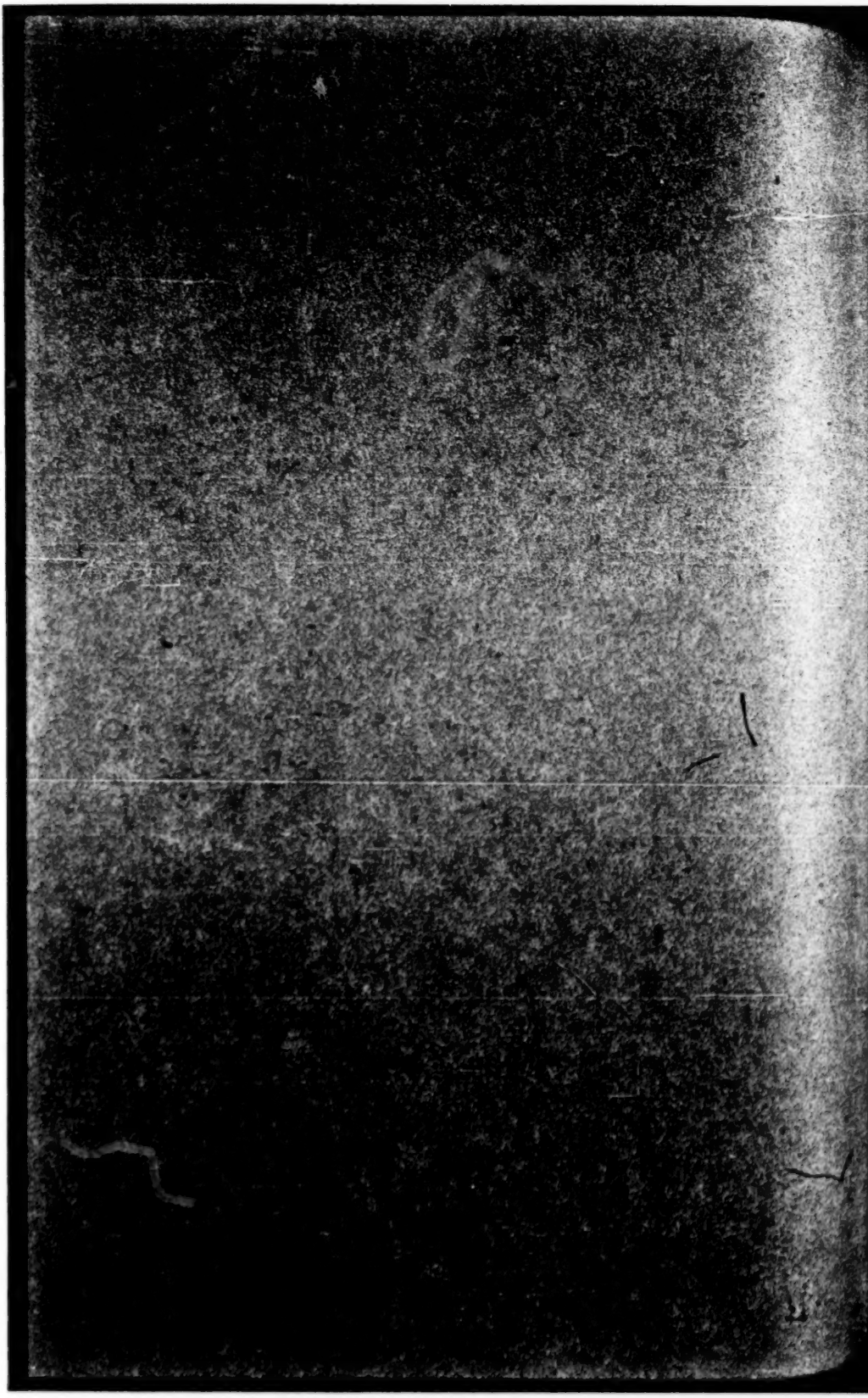

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CHARLES ELMORE CR

IN THE

# Supreme Court of the United States,

OCTOBER TERM, 1934.

No. 340

OLD COMPANY'S LEHIGH, INC.,
*Petitioner,*

*against*

HENRY E. MEEKER, as Receiver for The First National Bank in Mamaroneck, THE FIRST NATIONAL BANK IN MAMARONECK, and R. G. BREWER, INC.,
*Respondents.*

## BRIEF FOR RESPONDENT MEEKER, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE BALLOU PRESS NEW YORK

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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1934.

OLD COMPANY'S LEHIGH, INC.,
Petitioner,

against

HENRY E. MEEKER, as Receiver for The First National Bank in Mamaroneck, THE FIRST NATIONAL BANK IN MAMARONECK, and R. G. BREWER, INC.,
Respondents.

## Statement.

Petitioner prays for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review the determination of that court in so far as it affirms the decree of the District Court of the Southern District of New York, dismissing the first two counts of petitioner's amended bill of complaint, for failure to state a cause of action in equity.

## Facts.

The allegations of the amended complaint are fairly set forth in the petition and in the opinion of the Circuit Court of Appeals (71 Fed. (2d) 280).

## Summary of Argument.

POINT I. The courts below correctly held that Section 350-L, Subdivision 2, of the New York Negotiable Instru-

ments Law, is in conflict with federal law and therefore unenforceable in this case.

POINT II. The courts below correctly held that plaintiff was not entitled to reclamation since the bank's funds were not augmented by the transaction, and no funds belonging to plaintiff came into the receiver's hands.

## POINT I.

**The courts below correctly held that Section 350-L, Subdivision 2, of the New York Negotiable Instruments Law, is in conflict with federal law and therefore unenforceable in this case.**

The first of plaintiff's causes of action is based upon a preference in the distribution of an insolvent bank's assets attempted to be conferred by the New York statute cited, and the second, upon the common law right of a party to reclaim his property in a receiver's hands. In this point, we consider the former of these causes of action, and in the next, the latter.

Section 350-L (2) of the New York Negotiable Instruments Law reads as follows:

> "Except in cases where an item or items is treated as dishonored by nonpayment as provided in section three hundred and fifty-j, when a drawee or payor bank has presented to it for payment an item or items drawn upon or payable by or at such bank and at the time has on deposit to the credit of the maker or drawer an amount equal to such item or items and such drawee or payor shall fail or close for business as above, after having charged such item or items to the account of the maker or drawer thereof or otherwise discharged his liability thereon but without such item or items having been paid or settled for by the drawee or payor either in money or by an unconditional credit given on its books or on the books of any other bank, which has been requested

> or accepted so as to constitute such drawee or payor or other bank debtor therefor, the assets of such drawee or payor shall be impressed with a trust in favor of the owner or owners of such item or items for the amount thereof, or for the balance payable upon a number of items which have been exchanged, and such owner or owners shall be entitled to a preferred claim upon such assets, irrespective of whether the fund representing such item or items can be traced and identified as part of such assets or has been intermingled with or converted into other assets of such failed bank."

It is of decisive importance to note that the relation of trust and the right to priority created by this statute come into operation only when the "drawee or payor shall fail or close for business."

Accordingly, so far as it purports to apply to a national bank, this statute comes directly within the condemnation of this court as expressed in *Davis* vs. *Elmira Savings Bank*, 161 U. S. 275, in running counter to the federal statute (R. S. Sec. 5236; U. S. C. Title 12, Sec. 194) and the inflexible rule thereunder that ratable and equal distribution shall be made in national bank liquidations.

In *Davis* vs. *Elmira Savings Bank*, *supra*, this court said (p. 283):

> "It is clear that these two statutes cover exactly the same subject-matter. Both relate to insolvent banks; both ordain that the right of preference on the one side and the duty of ratable distribution on the other shall duly result from insolvency; both cover the assets of such banks coming, after insolvency, into the hands of the officer or person authorized to administer them It is equally certain that both statutes relate to the same duty on the part of the officer of the insolvent bank; the one directs the representative to make a ratable distribution; the other requires, if necessary the application of the entire assets to payment in full by preference and priority over all others of a particular and selected class of creditors therein named. We have, therefore, on the one hand, the statute of the United States, directing that the assets of an insolvent

national bank shall be distributed by the Comptroller of the Currency in the manner therein pointed out, that is, ratably among the creditors. We have on the other hand, the statute of the State of New York giving a contrary command. To hold that the state statute is operative is to decide that it overrides the plain text of the act of Congress. This results, not only from the fact that the two statutes, as we have said, cover the same subject-matter, and relate to the same duty, but also because there is an absolute repugnancy between their provisions, that is between the ratable distribution, commanded by Congress, and the preferential distribution directed by the law of the State of New York."

At page 287, the court says further:

"It is certain, that in so far as not repugnant to acts of Congress, the contracts and dealings of national banks are left subject to the state law, and upon this undoubted premise, which nothing in this opinion gainsays, the proposition is advanced that the deposit here considered of the Savings Bank with a national bank imported a contract to pay the claim of the former with the preference allowed by the New York statute. But this overlooks the plain terms of the New York law. That statute does not profess to deal with the bank and its relations as a going concern; it wholly and exclusively undertakes to regulate the distribution of the assets after insolvency. Insolvency, and insolvency alone, is made the criterion from which the preference is to arise. Indeed, the statute, in terms directs its mandate to discharge the claim with preference, not to the bank eo nomine, but to the assignee, trustee or agent, charged with administering its effects after insolvency has become flagrant. The claim of contract, therefore, conflicts with the very terms of the statute upon which it is based, and there is, therefore, no room for implying a contract. If such implication, however, could be invoked it must rest on the contention that inasmuch as the state statute gave a savings bank making a deposit the right to be preferred in case of insolvency, therefore the general state law must be presumed to have entered into the contract of the parties, and hence also engender the presumption that in case

of insolvency such deposit should be preferred. If the law of the State is to be read into the contract, then, of course, the law of Congress should also be read into it. We should thus have to consider all the deposits as made with an implication that they were subject to the Federal law, and hence the conflict between the two laws would become evident, and the Federal law, being paramount, would prevail."

See also:

*Easton* v. *Iowa*, 188 U. S. 220, 238;
*Texas & P. R. Co.* v. *Pottorff*, 78 L. Ed. 514, 517;
*McCandless* v. *Dyar*, 34 Fed. (2d) 989
*Fiman* vs. *State of South Dakota*, 29 Fed. (2d) 776, certiorari denied 279 U. S. 841;
*Steele* vs. *Randall*, 19 Fed. (2d) 40;
*First National Bank* vs. *Selden*, 120 Fed. 212;
*Beard* vs. *Independent District of Pella City*, 88 Fed. 375;
*Palo Alto County* vs. *Ulrich*, 199 Iowa 1, 201 N. W. 132.

It should be noted that in cases where no state statute was involved the Federal courts have consistently denied claims for priority on facts similar to those presented in the case at bar.

*American Can Co.* vs. *Williams* (C. C. A. 2, 1910), 178 Fed. 420;
*Wisdom* vs. *Keen* (C. C. A. 5, 1934), 69 Fed. (2d) 349;
*First National Bank* vs. *City of Miami* (C. C. A. 5, 1934), 69 Fed. (2d) 346;
*Lifsey* v. *Goodyear Tire & Rubber Co., Inc.* (C. C. A. 4, 1933), 67 Fed. (2d) 82;
*Allied Mills, Inc.* v. *Horton* (C. C. A. 7, 1933), 65 Fed. (2d) 708;

*Larabee Flour Mills Co. v. First National Bank of Dublin, Georgia* (D. C. Ga. 1931), 52 Fed. (2d) 146, affirmed 69 Fed (2) 351;

*Hirning v. Federal Reserve Bank of Minneapolis, Minnesota* (C. C. A. 8, 1931), 52 Fed. (2d) 382;

*Early & Daniel Co. vs. Pearson* (C. C. A. 5, 1929), 36 Fed. (2d) 732, certiorari denied 281 U. S. 734, 738, 748;

*Steele Briggs Seed Co., Ltd. vs. Spurway* (D. C. Iowa, 1928), 28 Fed. (2d) 42;

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*Ellerbe vs. Studebaker* (C. C. A. 4, 1927), 21 Fed. (2d) 993;

*Rorebeck vs. Benedict Flour & Feed Co.* (C. C. A. 8, 1928), 26 Fed. (2d) 140;

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*Mechanics & Metals National Bank of City of New York vs. Buchanan* (C. C. A. 8, 1926, 12 Fed (2d) 891, certiorari denied 273 U. S. 715;

*Nyssa-Arcadia Drainage District vs. First National Bank* (D. C. Oregon, 1925), 3 Fed. (2d) 648.

In *Allied Mills, Inc. v. Horton, supra*, the court said (pp. 710-711):

> "It is a rule of general application in federal courts that where checks on the collecting bank are deposited in the same bank to meet a draft which the bank holds for collection, no trust in the funds thus deposited arises in favor of the drawer of the draft. Hirning v. Federal Reserve Bank (C. C. A. 8) 52 F. (2d) 382, 82 A. L. R. 297 Larabee Flour Mills Co. v. First National Bank of Dublin et al, 52 F. (2d) 146 (D. C.); Larabee Flour Mills v. First National Bank of Henryetta, Okla., 13 F. (2d) 330 (C. C. A. 8); Empire State Surety Co. v. Carroll County et al., 194 F. 593 (C. C. A. 8). The reason

generally assigned in the cases is that in such transactions there is no augmentation of the assets of the bank. There is merely a transfer of existing assets of the bank from one to another.

"If Crisp had brought into the bank the cash wherewith to pay this draft and had paid it in for that specific purpose, the assets of the bank would have been augmented by the cash thus brought in, and a trust might then arise in favor of the drawer of the draft in case the bank fails to pay, and the funds coming into the bank are traceable."

* * * * * * *

"Through the transaction the bank received nothing. Crisp's check depleted his own account in the bank, and the bank's liability for the same amount to the drawer of the draft at once attached. No cash came to the bank. Nothing was taken from or added to its assets."

While the case as bar involves the first and only determination in the Second Circuit construing Section 350-L (2), it is to be noted that the Appellate Division, Second Department of the Supreme Court of the State of New York, in a recent case has similarly construed the same section, likewise holding it to be inconsistent with federal law and therefore inapplicable to an insolvent national bank.

*Jones* vs. *Board of Education, Town of Pelham*, 242 App. Div. 17.

In that case, the court said (pp. 24, 25):

"It may be that its officers were under the impression that it had a right of preference in the distribution of the assets of the Pelham National Bank by virtue of section 350-l of the Negotiable Instruments Law, added by chapter 589 of the Laws of 1929. If they so believed, they were in error, because there are no preferences among creditors of a national bank. Its assets must be divided ratably among its creditors. (U. S. Code, tit. 12, § 194; Davis v. Elmira Savings Bank, 161 U. S. 275.)"

Petitioner mistakenly argues that the state statute in conferring the preference fixed the relationship of the parties

and granted a lien *ab initio*. Plainly, it does no such thing. It simply lays down the rule to be followed in cases where the collecting bank becomes insolvent. Since that rule is contrary to the federal statutory rule, it can not be enforced in this case.

*U. S. Fidelity & Guaranty Co.* vs. *National Bank of Americus*, 4 Fed. Supp. 569, upon which petitioner relies, is not inconsistent with the ruling here because (a) the state statute there involved contained no such provision as Section 350 L (2), and (b) the check of plaintiff in that case, drawn on an outside bank, was actually collected by the defendant bank, resulting in the augmentation of its assets traced, into the hands of its receiver. The same result, doubtlessly, would have been reached regardless of the state statute, and consequently the case is of no importance here.

*Royal Manufacturing Co.* vs. *Spradlin*, 6 Fed. Supp. 98, also relied upon by petitioner, is likewise clearly distinguishable. In that case, the failed bank had issued its draft upon its sufficient account with another bank to pay the collection made by it, and the question was whether that draft was enforceable despite the stop order of the receiver. The state statute (C. S. Supp. N. C. 1924, Sec. 218 C as amended by Pub. Laws 1927, C. 113) created a lien without regard to the solvency of the bank. As the learned court there said (p. 102):

> "The lien exists before insolvency, and subsequent insolvency does not invalidate it."

In the case at bar, as heretofore pointed out, the lien and preference are conferred, by express terms, only in the event of insolvency.

It is further to be noted that the decision of the court in the *Spradlin* case, *supra*, was based largely upon the opinion in *City of Miami* vs. *First National Bank of St. Petersburg*, 58 Fed. (2d) 561, which was practically retracted by the later decision of the same court in the same case *First National Bank of St. Petersburg* vs. *City of Miami*, 69 Fed. (2d) 346.

## POINT II.

**The courts below correctly held that plaintiff was not entitled to reclamation since the bank's funds were not augmented by the transaction, and no funds belonging to plaintiff came into the receiver's hands.**

The general rule, as well established in the federal courts, is that to reclaim property from a receiver the claimant must actually and definitely trace his property into the receiver's hands.

*Schuyler* v. *Littlefield*, 232 U. S. 707;
*Blakey* v. *Brinson*, 286 U. S. 254;
*Smith* v. *Zemurray* (C. C. A. 5 1934), 69 Fed. (2d) 5;
*Connolly* v. *Lang* (C. C. A. 7 1933), 68 Fed. (2d) 199;
*Swan* v. *Childrens Home Society of West Virginia* (C. C. A. 4 1933), 67 Fed. (2d) 84;
*Harmer* v. *Rendleman* (C. C. A. 4 1933), 64 Fed. (2d) 422;
*McNair* v. *Oesterreicher* (C. C. A. 5 1933) 63 Fed. (2d) 876;
See also cases *supra* (pp. 5, 6).

This, of course, petitioner can not do because the transaction here involved resulted merely in the shifting of credits upon the books of the defendant bank. This fact also confronted petitioner with the further difficulty of inability to prove the fundamental requisite that in the transaction the funds of the bank had been augmented.

See cases *supra*.

To avoid these problems, petitioner resorts to the specious "as if" theory which has been rejected by the federal courts.

*Smith* v. *Zemurray* (C. C. A. 5—1934), 69 Fed. (2d) 5;
*Connolly* v. *Lang* (C. C. A. 7—1933), 68 Fed. (2d) 199;
*Allied Mills* v. *Horton* (C. C. A. 7—1933), 65 Fed. (2d) 708;
*McNair* v. *Oesterreicher* (C. C. A. 5—1933), 63 Fed. (2d) 876.

In *Connolly* v. *Lang*, *supra*, the court very appropriately said (202):

> "If this were a controversy only between appellee and the bank, there might be good reason for permitting fiction to pervert the facts because all the equities would be with appellee. This action, however, is really between appellee and the general depositors, who without fault on their part have been placed in positions which no doubt are equally deplorable and whose rights to have equity done are equally worthy of consideration."

Petitioner relies upon *Blakey* vs. *Brinson*, 286 U. S. 254, as authority for the approval of the "as if" doctrine, but plainly, Mr. Justice Stone did no more than refer to the theory, without expressing any approval thereof.

Whatever merit the theory may have, it surely should not be applied here where at most there was nothing more than a shifting of credits on the books of the bank. To approve the doctrine under such circumstances would only bring chaos to long established principles of insolvency liquidation. It is significant that whatever adherence the Circuit Court of Appeals of the Fifth Circuit may have appeared to give to the doctrine, has been explicitly and completely retracted in:

*Wisdom* vs. *Keen*, 69 Fed. (2d) 349;
*First National Bank* vs. *City of Miami*, 69 Fed. (2d) 346;
*Smith* vs. *Zemurray*, 69 Fed. (2d) 5.

**The petition for a writ of certiorari should therefore be denied.**

Respectfully submitted,

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DEC 13 193

# Supreme Court of the United States

OCTOBER TERM, 1934.

No. 340.

OLD COMPANY'S LEHIGH, INC., *Petitioner,*

*vs.*

HENRY E. MEEKER, as Receiver of the First National Bank in Mamaroneck, THE FIRST NATIONAL BANK IN MAMARONECK, and R. G. BREWER, INC., *Respondent.*

## BRIEF OF RESPONDENT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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In the instant case the collecting bank never received by way of proceeds of the note, an identifiable res, an essential to the creation of a trust. Its assets were not augmented because the collection proceeds consisted of a check drawn against a general deposit balance already in the now insolvent National

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# Supreme Court of the United States

OCTOBER TERM, 1934.

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HENRY E. MEEKER, as Receiver of the First National Bank in Mamaroneck, THE FIRST NATIONAL BANK IN MAMARONECK, and R. G. BREWER, INC., *Respondent.*

---

## BRIEF OF RESPONDENT.

---

### I.

### OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 71 Fed. (2nd) 280 (R. 23 to 27). The opinions of the District Court are set out in the record pages 7 and 17.

## II.

## JURISDICTION.

Writ of certiorari was granted on October 8, 1934 (R. 29), under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. Title 28, Section 347).

## III.

## STATEMENT OF CASE.

The respondent makes no objection to the statement of the case set out in the petitioner's brief on the merits. The case before this court can be briefly stated as follows: The petitioner seeks a reversal of the decision of the Circuit Court of Appeals for the Second Circuit, affirming the action of the United States District Court for the Southern District of New York in dismissing, as to the respondent, the petitioner's action in equity, seeking to establish a trust against the assets of the First National Bank in Mamaroneck, New York, insolvent, based on general principles of equity and the provisions of Sec. 350-L, subd. 2, art. 19-A of the New York Negotiable Instruments Law which is, in language, the same as Section 13 of the Bank Collection Code. On January 14, 1933, the last day the respondent bank did business as a solvent institution it surrendered to R. G. Brewer, Inc., a note in the amount of $3000 made by that company, owned by the petitioner and in the hands of the bank as sub agent to collect and remit, in exchange for the note debtor's check drawn against a general deposit balance already in this bank, and failed to remit the proceeds.

## IV.

## SUMMARY OF ARGUMENT.

(A) Where, as in the instant case, a claimant seeks to recover from the Receiver of an insolvent National bank money alleged to have been held by the bank on a trust, he must affirmatively establish under the unmistakable trend and weight of Federal decisions, (1) that his transaction with the bank has resulted in a trust relationship; (2) that the assets of the bank have been augmented or increased by new cash or property accruing from the claimant; and (3) that the new property, in its original or changed form, can be traced into the assets taken over by the Receiver at suspension. No augmentation occurs hence no trust relationship or tracing exist where the transaction results only in a shifting of bookkeeping credits on the books of the now insolvent National bank.

In the instant case the collecting bank never received by way of proceeds of the note, an identifiable res, an essential to the creation of a trust. Its assets were not augmented because the collection proceeds consisted of a check drawn against a general deposit balance already in the now insolvent National bank. Consequently, no proceeds of the transaction are traceable into the assets that passed into the hands of the Receiver.

(B) Where, as in the instant case, the record facts establish that neither trust relationship, augmentation, nor tracing of funds appear, the rights of the claimant against an insolvent National bank are in no way increased by the provisions of Sec. 350-L, subd. 2, art. 19-A of the New York Negotiable Instruments Law, which, ~~after which~~ in language, is the same as Section 13 of the Bank Collection Code and will be referred to by the latter title hereafter.

## V.

## ARGUMENT.

**(A) Where, as in the instant case, and in the companion cases Nos. 338 and 374 set for argument immediately before and after the instant case, a claimant seeks to recover from the Receiver of an insolvent National bank money alleged to have been held by the bank on a trust, he must affirmatively establish under the unmistakable trend and weight of Federal decisions, (1) that his transaction with the bank has resulted in a trust relationship; (2) that the assets of the bank have been augmented or increased by new cash or property accruing from the claimant; and (3) that the new property, in its original or changed form, can be traced into the assets taken over by the Receiver at suspension. No augmentation occurs hence no trust relationship or tracing exist where the transaction results only in a shifting of bookkeeping credits on the books of the now insolvent National bank.**

**In the instant case the collecting bank never received by way of proceeds of the note, an identifiable res, an essential to the creation of a trust. Its assets were not augmented because the collection proceeds consisted of a check drawn against a general deposit balance already in the now insolvent National bank. Consequently, no proceeds of the transaction are traceable into the assets that passed into the hands of the Receiver.**

*The mandate of the National Bank Act requires a pro rata distribution of the assets of an insolvent National bank among all creditors. This mandate can be avoided by the respondent only upon affirmative proof of trust relationship, augmentation, and tracing of funds to the Receiver.*

Section 5236 U. S. R. S. (12 U. S. C. Ch. 2, Sec. 194) (Appendix p. 33) requires a pro rata distribution of an insolvent National bank's assets among all its creditors. In referring to this section this court said in Cook County National Bank v. United States, 107 U. S. 445, 450, that it

> "*provides for the distribution of the entire assets of the bank*, giving no preference to any claim except for moneys to reimburse the United States for advances in redeeming the notes. When this reimbursement is fully provided for, the balance of the assets, as the proceeds are received, is subject to a ratable dividend on all claims proved to the satisfaction of the receiver, or adjudicated by a court of competent jurisdiction."

Even the United States as a sovereign is a general creditor only, unless it has taken the security provided by law, except for advances to redeem circulating notes and in minor instances involving certified checks given for customs duties and certain taxes. (19 U. S. C. Ch. 3, sec. 198; 26 U. S. C. Ch. 3, sec. 109). The circulating notes are required to be adequately secured at all times and the debtor continues to be primarily liable for the taxes and duties and consequently the exceptions are very rarely applicable.

The petitioner and all others similarly situated can avoid participation in the pro rata distribution provided by the National Bank Act only upon a showing that the assets that passed into the hands of the Receiver for the benefit of all creditors included the property of the claimant or its proceeds. The petitioner must show, *by the burden of proof*, that as a result of its transaction the bank, before suspension (a) received property of the claimant in trust, (b) that the property so received actually augmented the existing assets of the bank by way of adding thereto cash or other property (as distinguished from the addition of a bookkeeping credit) and (c) that the augmented assets, in their original or changed form passed into the hands of the Receiver.

Unless the record contains affirmative proof by the petitioner of trust relationship, augmentation and tracing of funds to the Receiver the trust claim fails because all doubts must be resolved in favor of the bank Receiver who is the trustee for general creditors. As stated by this court

in Texas & Pacific Railway v. Pottorff, 291 U. S. 245, 261, note 19, decided at the last term:

> "The claimant has the burden of identifying the property in its original or altered form. Schuyler v. Littlefield, 232 U. S. 707. It is not enough to show that at the time of receipt the general assets of the insolvent were increased or that debts were discharged. Wuerpel v. Trust Co., 238 Fed. 269, 272-3; Knauth v. Knight, 255 Fed. 677; State Bank of Winfield v. Alva Security Bank, 232 Fed. 847; In re See, 209 Fed. 172; In re Dorr, 196 Fed. 292; City Bank v. Blackmore, 75 Fed. 771; compare Railway v. Spiller, 274 U. S. 304, 311; Cunningham v. Brown, 265 U. S. 1."

In its opinion in Schuyler v. Littlefield, 232 U. S. 707, this court said, at page 713:

> "All these claims were disallowed because of the failure to make the requisite proof. Our investigation of the facts leads us to the same conclusion so far as concerns the appellants' claim. They were practically asserting title to $9,600 said to have been traced into stock in the possession of the Trustee. Like all other persons similarly situated, they were under the burden of proving their title. If they were unable to carry the burden of identifying the fund as representing the proceeds of their Interborough stock their claim must fail. If their evidence left the matter of identification in doubt the doubt must be resolved in favor of the trustee, who represents all of the creditors of Brown & Co., some of whom appear to have suffered in the same way. Like them, the appellants must be remitted to the general fund."

The following excerpt from the opinion of the Circuit Court of Appeals, Eighth Circuit in Larabee Flour Mills v. First National Bank, 13 Fed. (2nd) 330, certiorari denied 273 U. S. 727, involving facts similar to those presented in the instant case, summarizes the principles of law applicable to these claims:

*"The real issue in each case is between the preference claimant and general creditors of the bank. They will get less if the preference is allowed. Each claimant asserted an equity, that the assets taken over by the Comptroller are trust funds in which it is a preferred beneficiary. It is difficult to explain or understand by what equitable right one who has not contributed to the creation of a fund should be given a special and superior interest therein, though some of the state courts seem to so hold. The collecting banks acted as agents,* Commercial Bank v. Armstrong, 148 U. S. 50, 13 S. Ct. 533, 37 L. Ed. 363, *and had they collected and retained the funds called for by the drafts, as was their duty on account of insolvency, the equities of claimants would be plain; but instead of doing so they merely shifted credits on their books and records. No part of the funds in the banks when they failed was placed there by claimants or by any one for them. In each case the draft was paid by check on the insolvent. No additional funds were brought into the bank by either transaction.* If the drafts which they held for collection had been paid in currency or by check on some other bank, the insolvents' assets would have been increased that much when thereafter their remittance drafts were dishonored; and in that event equity would have regarded the collections as trust funds, followed them into the increased assets and, to the extent of the increase applied them first in discharge of these claims. *This is our conception of the rule and the reason for it, applied in the federal courts.* It has been repeatedly announced by this court. In the course of the opinion of this court in Beard v. Independent Dist. of Pella City, 88 Fed. 375, 31 C. C. A. 562, which presented the same issue we have here, on like controlling facts, it is said:

'Unless it appears that the fund or estate coming into possession of the receiver has been augmented or benefited by the wrongful use of the trust fund, no reason exists for giving the owner of the trust fund a preference over the general creditors, * * * and to assume (the position) of the owner of a trust fund, and as such to assert a preferential right to payment

> in full out of the cash fund coming into the hands of the receiver, to the detriment of the general creditors, it (claimant) ought to be held to satisfactory proof of the fact upon which the right to a preference rests, to wit, that the fund coming into the receiver's hands has been augmented and increased by the addition thereto of the trust money, *not as a matter of inference*, nor as a result of mere entries on books of account, *but because the fund or property against which the preference is sought to be enforced has been in fact augmented or benefited by the addition thereto of the trust fund.'*
>
> *The rule was reannounced by this court* in Empire State Surety Co. v. Carroll County, 194 F. 593, 606, 114 C. C. A. 435, and again in *Mechanics & Metals National Bank v. Buchanan*, 12 F. (2nd) 891, opinion filed April 28, 1926. *The Fifth Circuit announced the same principle in Anheuser Busch Brewing Ass'n. v. Clayton*, 56 F. 759, 6 C. C. A. 108; *the Sixth Circuit in City Bank of Hopkinsville v. Blackmore*, 75 F. 771, 21 C. C. A. 514; *and the Second Circuit in American Can Co. v. Williams*, 178 F. 420, 101 C. C. A. 634. See also *Boone County National Bank v. Latimer* (C. C.) 67 Fed. 27; Nyssa-Arcadia Drainage Dist. v. First National Bank of Vale (D. C.), 3 F. (2nd) 648." (Italics inserted.)

In the instant case the petitioner can establish a general claim only, because the original relationship of principal and agent, admittedly existing between the parties, never became that of trustee and cestui que trust. The collecting bank received nothing as a result of the collection of the respondent's item except a check drawn on itself. This check resulted in a mere transfer of bookkeeping credits which did not create a res, an essential to a trust. A trust cannot exist unless there is a res, *i. e.*, property to which the trust pertains. (American Law Institute, Trusts Restatement, Section 70.) A debt owing by the collecting bank to either its depositor or the forwarder of the collection item cannot become a trust res because "An obligor

cannot be trustee either of his duties or of the obligee's rights under the obligation." (American Law Institute, Trusts Restatement, Section 75, and comment "a" and illustration thereto.) As stated by this court in Blakey v. Brinson, 286 U. S. 254, 263, in discussing similar transfers of credit:

> "The cancellation of the credit balance by the debit neither suggests any intention to establish a trust nor points to any identifiable thing which could be the subject of it."

In a recent case in the Circuit Court of Appeals, Eighth Circuit, that of Hirning v. Federal Reserve Bank, 52 Fed. (2nd) 382, the basic facts were similar to those presented in the instant case. The now insolvent National bank received an item for collection and remittance and as the collection proceeds received a check drawn on itself. The court said in its opinion, page 386:

> "It is contended by the appellee that the checks sent by the Reserve Bank to the Brookings Bank constituted a trust fund, and that this trust fund has been traced into the currency and collection items sent by the Brookings Bank to the Reserve Bank.
>
> The trial court seems to have adopted this view as one of the grounds of its decision in ordering judgment for defendant.
>
> We do not agree with this contention. It must be remembered that the checks sent to the Brookings Bank by the Reserve Bank were all of them checks drawn on the Brookings Bank. *When the Brookings Bank accepted the checks, this produced no additional funds in its hands. Its assets were not augmented. No trust fund was created. If there was no trust fund, there could, of course, be no tracing of the trust fund into any assets of the Brookings Bank.* The doctrine that a trust fund is created when checks drawn on bank A by bank B for collection, i. e., for payment, has been disapproved by the decisions in this Circuit, as has also the doctrine that the forwarding bank or its principal

has a general lien on the assets of the drawee bank for the payment of such checks. Rorebeck v. Benedict, etc. Co., 26 Fed. (2nd) 440; Farmers National Bank v. Pribble, 15 Fed. (2nd) 175; Larabee Flour Mills v. First Nat. Bank, 13 Fed. (2nd) 330; Macy v. Roedenbeck, 227 Fed. 346, 352; Beard v. Independent Dist., 88 Fed. 375." (Italics inserted.)

To the same effect are the following excerpts from opinions of the Circuit Courts of Appeal for the Fourth, Fifth and Seventh Circuits.

*Allied Mills, Inc. v. Horton,* (C. C. A. 7) 65 Fed. (2nd) 708:

> *"It is a rule of general application in federal courts that where checks on the collecting bank are deposited in the same bank to meet a draft which the bank holds for collection, no trust in the funds thus deposited arises in favor of the drawer of the draft.* Hirning v. Federal Reserve Bank (C. C. A. 8) 52 Fed. (2nd) 382, 82 A. L. R. 297 change position of C. C. A. 8 to conform to other citations; Larabee Flour Mills v. First Nat. Bank of Dublin et al., 52 Fed. (2nd) 146 (D. C.); Larabee Flour Mills v. First National Bank of Henryetta, Okla., 13 Fed. (2nd) 330 (C. C. A. 8); Empire State Surety Co. v. Carroll County et al., 194 F. 593 (C. C. A. 8). The reason generally assigned in the cases is that in such transactions there is no augmentation of the assets of the bank. There is merely a transfer of existing assets of the bank from one to another." (Italics inserted)

*Anheuser-Busch Brewing Ass'n. v. Clayton,* (C. C. A. 5) 56 Fed. 759-60:

> *"The relation between appellant and the McNab Bank as to the draft on Morris sent by the former to the latter for collection was that of principal and agent; but, in order to enforce a trust in favor of appellant as to any money collected on said draft, it must be specifically traceable into the hands of the receiver.* Commercial Nat. Bank v. Armstrong, 39 Fed. Rep. 684;

> same case in Supreme Court of the United States (Oct. term, 1892; not yet officially reported, 13 Sup. Ct. Rep. 533). *Accepting Morris' check in payment of his debt to appellant, and charging the amount of it on Morris' account by the bank, was but a shifting of its liability, whereby it became appellant's debtor, and assumed the obligation to pay to it the amount of the check less exchange.* There is nothing to indicate that this amount was separated and kept unmingled with the bank's own money; but, on the contrary, it is conceded that it is undistinguishable from the mass of the bank's own money, and cannot be traced to and identified in the hands of the receiver. This being so, appellant has no better equity than the other creditors of the bank, and is entitled to no priority over them. It can only come in as a general creditor, * * *." (Italics inserted)

*Ellerbe v. Studebaker Corp.* (C. C. A. 4) 21 Fed. (2nd) 993:

> "In ordinary cases, of course, the receipt by the collecting bank of a check drawn against the account of one of its depositors does not bring anything into the bank, and cannot be said to augment in any way assets passing into the hands of the Receiver. It is a mere shifting of credits. Larabee Mills v. First Nat. Bank (C. C. A. 8th) 13 Fed. (2nd) 330; American Can Co. v. Williams (C. C. A. 2) 178 Fed. 420; North Carolina Corp. Com. v. Merchants & Farmers Bank, 137 N. C. 697, 50 S. E. 308."

A claim for a trust status against the assets of an insolvent National bank, based upon a transfer of bookkeeping credits was classified as general only by the Circuit Court of Appeals for the Fifth Circuit in its recent decision in First National Bank of St. Petersburg v. City of Miami, 69 Fed. (2nd) 346. The court said in its opinion (p. 346-347):

> "We agree with appellant that the case proven is not the case alleged, that as proven no case of trust was made out, and that the decree must be reversed. As alleged the draft 'was presented to the St. Peters-

> burg bank for payment and was paid,' as proven there was no payment. The draft was indeed marked paid, but *the payment thus evidenced was not in fact the payment of moneys or of any identified or identifiable thing. It was merely a form of bookkeeping; 'it was but a shifting of its liability' from the drawer to the forwarding bank.* Anheuser-Busch v. Clayton (C. C. A.) 56 F. 759, 760. As alleged 'said sum of $5000 thus collected and held for it by the St. Petersburg Bank is still in the possession of the bank and its receiver.' *As proven, no sum whatever was collected and held for plaintiff by the St. Petersburg bank to which a trust could attach. In this state of the proof to hold the bank as trustee would be to hold it a trustee not of a thing, but of a claim against itself, a holding on its face so artificial and unreal as to be impossible.*" (Italics inserted)

These excerpts are representative of many Federal decisions denying trust claimants a priority status under facts substantially the same as those presented in the instant case. No final Federal decisions to the contrary are cited by the petitioner although it does cite Federal decisions which were later reversed, as discussed hereafter.

The petitioner argues that the result of the collection transaction was the same as if the maker of the note had withdrawn the cash and paid it back over the counter in payment of the note. This is not a novel contention but one that has been rejected repeatedly by courts of equity. We know that the note obligor did not withdraw cash and redeliver it to the bank and fiction will not be resorted to to pay the petitioner from the assets that belong to depositors. To quote from the summary of an article by Mr. Justice Stone entitled "Legal Problems in the Transmission of Funds", Columbia Law Review, June 1921, page 525:

> "The very essence of the right of priority over other creditors depends upon the setting apart of a particular fund for the benefit of the depositor. There is no basis for giving one depositor a priority over another unless this is an essential part of the transaction. It

is, of course, important that bankers should be held to a high standard of accountability to their customers. It would seem, however, that this should be accomplished by appropriate legislation which should inure to the benefit of depositors generally rather than by the adoption of a rule of law creating special rights in favor of a limited class of customers on the theory that they are the beneficiaries of a quasi-trust fund which never in fact exists or is intended to exist as such."

On page 518 of the article Mr. Justice Stone says:

"The doctrine that money deposited with a bank for a special purpose is a fiduciary deposit, has been carried to extreme lengths in this country in those cases where no specific money was ever paid to the bank, the customer merely giving or procuring a credit in account in favor of the bank upon the banker's undertaking to effect payment at a distant point. Here there is no specific deposit. *The transaction results only in a credit appearing on the books of the bank, there being at no point of time any specific money or other res paid to or set apart or held by the bank for account of the customer. Even if there were an executory undertaking of the bank to become a fiduciary by setting apart such specific sum, such a relationship is not established until there is some actual setting apart or segregation of the money or some other res as the subject matter of the fiduciary relationship.*" (Italics inserted)

In the case of Schumacher v. Brinson, 52 Fed. (2nd) 821, the Circuit Court of Appeals for the Fourth Circuit resorted to a fiction similar to that urged by the Petitioner, but its decision allowing a trust claim was unanimously reversed by this court as Blakey v. Brinson, 286 U. S. 254, this court stating, pages 262, 263:

*"The court below thought that the legal consequence to be attributed to the debiting of the account with the supposed purchase price of the bonds was the same as if the respondent had cashed a check for the amount and had then proceeded to hand the money back to the bank under a specific agreement between him and the*

*bank that the money was to be held as a special fund, for the sole purpose of completing the purchase.* This view is not without support. (Citing authorities.) Such a procedure, if actually carried out, might afford a basis which is lacking here, for the inference that respondent, no longer content with the role of creditor, had sought to establish a trust fund. *But the mere debiting of his account, without more, for the reimbursement of the bank for the obligation which it was supposed to have incurred or paid, lends no support to such an inference. The cancellation of the credit balance by the debit neither suggests any intention to establish a trust nor points to any identifiable thing which could be the subject of it.*"

The following excerpts indicate similar action by other appellate courts. Smith v. Zemurray (C. C. A. 5), 69 Fed. (2nd) 5, 6.

"*To the appellee's 'as if' argument, 'the matter is to be treated as though Robinson had presented the check to the teller and on receiving the money had paid it back over the counter to buy a draft,'* American National Bank v. Miller, 229 U. S. 520, 33 S. Ct. 883, 57 L. Ed. 1310, *the receiver replies: 'Not so. We know from Robinson's own testimony that this did not occur.* We know from it that what did occur was an exchange of the paper of a bank, hopelessly insolvent, if plaintiff is right, in the form of an accepted draft on it, for paper of the same bank in the form of its draft on New York. This and nothing more.' He argues, too, that *when what actually occurred is known, it is idle to speculate on what might have been the legal effect of an entirely different occurrence.* Blakey v. Brinson, 286 U. S. 254, 52 S. Ct. 516, 76 L. Ed. 1089, 82 A. L. R. 1288."

Wisdom v. Keen (C. C. A. 5), 69 Fed. (2nd), 349, 350:

"This, then, is a case in which the bank and its customer definitely agreed that $1200.00 in cash should be held by the bank in escrow, to be delivered (not paid) on a condition and checks were given to the bank on

which it was to get the cash out of its own vault. The obligation was perfect to segregate and hold the cash. *Equity if dealing with the bank alone might well consider that it had done what it should have done and might well hold it to the consequences.* American National Bank v. Miller, 229 U. S. 517, 33 S. Ct. 883, 57 L. Ed. 1310. *But in dealing with the distribution of the assets of an insolvent national bank and with the requirement of ratable dividends to all claimants a more stringent adherence to what was actually done is proper.* Here the bank agreed to segregate a trust res but never did it. By their mutual intent the bank's relation to Keen was that of a trustee rather than a debtor, but there is still no identifiable trust res traceable as such, but only a liability for a breach of trust in failing to create the res. This liability, absent a statutory priority or lien, has no higher dignity than other general liabilities. As to every general creditor the bank has failed to do what it ought to have done and what it promised to do. The federal statute puts all such claimants on an equality. Even claims due the United States have no preference. Cook County National Bank v. United States, 107 U. S. 445, 2 S. Ct. 561, 27 L. Ed. 537." (Italics inserted)

*Hecker-Jones-Jewell Milling Co. v. Cosmopolitan Trust Co.* (Supreme Judicial Court of Massachusetts) (De Courcy, J.) 136 N. E. 333-335:

"The other theory is that the transaction by which the draft was paid was in legal effect the same as if B. Greenglass & Son had drawn from their account through the paying teller the sum of $3518.00, in money, and then handed it back to the collecting teller in payment of the draft. *But that is not what the debtor did; and the difference is essential, not a mere matter of form.* The payment made to the bank was not cash, to which the moment before it had not the slightest claim, and which therefore would count as wholly separate 'proceeds' of the collection; it was merely the lessening of one of its own debts, and productive of nothing even remotely suggesting a 'res' for a trust. *The difference between the legal significance*

*of the actual and the assumed courses of action cannot be ignored or confused.*" (Italics inserted)

*People v. Merchants & Mechanics Bank*, 78 N. Y. 269:

"The learned counsel contends that the Troy Bank was agent of the Chemical Bank to receive payment of the check. *Suppose it were, what did it receive as such payment? Simply its own obligation.* If anything was set apart by charging up the check, it was only so much of the bank's indebtedness to its depositor. * * * To make this case analogous it would be necessary to show that the Troy Bank had separated from its general assets, and placed in the hands of some depositary a sum sufficient to pay the check, for the express purpose of being so applied, and that this fund had come to the hands of the receiver in some form. There is no approach in this case to any such state of facts."

The only Federal decision we find wherein a fiction was resorted to in allowing a trust claim against the Receiver of an insolvent National bank is that of Schumacher v. Harriett, 52 Fed. (2nd) 817, relied on by the respondent. The error of this decision, as we view it, is discussed in detail in the petitioner's brief in the companion case of Adams v. Champion, No. 338, this term. The arguments against the soundness of the Harriett decision are summarized in the recent opinions of the Circuit Court of Appeals for the Fifth Circuit as follows:

*Pottorff v. Key*, 67 Fed. (2nd) 833:

"Schumacher v. Harriett (C. C. A.) 52 Fed. (2nd) 817, 82 A. L. R. 1, is much relied on to sustain the judgment appealed from. The court there reviews the cases and concedes that they establish such principles as we have just asserted, but avoids their consequences *by the novel view* that a trust check, when treated by a bank as one of its cash items, is thereby confused with its cash as though it had been unidentifiable currency; and that, if the bank misuses the check, it thereby sets apart as a trust res an equivalent value of other cash

assets. *Such a doctrine amounts to saying that in every case of misapplied money or money's equivalent the wrongdoer's other cash and cash items stand in its place so long as he has any, establishing in effect a general lien on all such.* 'If the plaintiff's contention be well founded, and to follow misappropriated moneys it is only necessary to show that a receiver has, and that the trustee had, assets, the rule is simply that a demand for such moneys is a preferred claim aga nst any substantial estate. *To adopt this view is to do away with all the equitable principles out of which the right to follow trust funds grew.*' American Can Co. v. Williams (C. C. A.), 178 F. 420, at page 423. *We hold in this connection that, if a trust res can be followed, it must be; and that a lien by confusion can be fixed on a fund only when the confusion is actual and when the fund is shown to have really received and to still contain the trust res or its proceeds.* The judgment is reversed, with direction to disallow appellee's claim as preferred and to allow it as a general claim only." (Italics inserted)

*Wisdom v. Keen,* 69 Fed. (2nd) 349, 350:

"The view that when a bank becomes obligated to collect for another person checks drawn on itself and makes entries of their collection, it must in equity be considered to have done what it should have done, to wit, to have collected them in cash though afterwards commingling the customer's cash thus collected with its own, so that a traceable res is brought into being with title vested in the customer, has been adopted by a growing number of State courts and is said to be the majority view in an elaborate examination of the cases in 82 A. L. R. page 97. *It was pressed to its furthest extent in the Fourth Circuit in Schumacher v. Harriett,* 52 Fed. (2nd) 817, 82 A. L. R. 1, and *Schumacher v. Brinson,* 52 Fed. (2nd) 821. *Otherwise the Federal cases have been to the contrary.* 82 A. L. R. 101. Schumacher v. Brinson was appealed and reversed as Blakey v. Brinson, 286 U. S. 254, 52 S. Ct. 516, 76 L. Ed. 1089, 82 A. L. R. 1288. *We refused to follow Schumacher v. Harriett in Pottorff v. Key* (C. C. A.), 67 Fed. (2nd) 833. At the conclusion of the opinion in

*Texas & Pacific R. Co. v. Pottorff*, 54 S. Ct. 416, 78 L. Ed. , *the Supreme Court again indicates the necessity of an identifiable trust res in order to create a trust by misconduct as distinguished from a general liability in contract or tort. Whether the question be one of general* [illegible] *jurisprudence or of the application of the federal law relating to insolvent national banks, the views of the Federal courts must in such courts be controlling.*" (Italics inserted)

Of course had the collecting National Bank segregated a part of its cash or cash items and earmarked the same, the trust claim contended for could be established. The difference between segregation and non segregation is illustrated in St. Augustine Paint Company v. McNair (C. C. A. 5), 59 Fed. (2) 755, where the bank physically segregated a part of its cash to purchase the claimant's check held for collection. The court in its opinion at page 757 said:

> "The conversion of the check into cash and segregation of such cash from the bank's general assets before using the check are of vital consequence, as those facts distinguish that transaction from those in which a bank of deposit merely credited a check to the depositor's account so as to become the depositor's debtor, and thereafter used the check to pay the bank's own debts in such a manner that the proceeds were absorbed in a clearing transaction with no gain to the receiver, such as in Empire State Surety Co. v. Carroll Co. (C. C. A. 8), 194 Fed. 593," and other cases cited.

We believe that the above authorities establish that this court will not resort to the fiction urged by the petitioner to avoid the settled Federal rule which controls the petitioner's claim. *The Bank Receiver submits that in this case, as in Blake v. Brinson, 286 U. S. 254, the claim should be classified as general only, because of the failure to establish a relationship of trustee and cestui que trust so far as the proceeds of the note are concerned.*

**(B) Where, as in the instant case, the record facts establish that neither trust relationship, augmentation, nor tracing of funds appear, the rights of the claimant against an insolvent National bank are in no way increased by the provisions of Sec. 350-L, subd. 2, art. 19-A of the New York Negotiable Instruments Law, which, in language, is the same as Section 13 of the Bank Collection Code and will be referred to by the latter title hereafter.**

*Section 13 of the Bank Collection Code* (Sec. 350-L, subd. 2, Art. 19-A N. Y. Negotiable Instruments Law) *does not alter or modify in any way the Federal rule stated under (A) above.*

It has always been the position of the Comptroller of the Currency and it is the position of the bank Receiver in this case that all of the provisions of the Bank Collection Code, adopted in 18 States, are applicable to the transactions of National banks doing business in those States, except Section 13 of this Code and, as more fully hereinafter indicated, it is believed section 13 is inapplicable to insolvent National banks because it is in conflict with the pro rata distribution mandate of Congress (Sec. 194, Title 12 U. S. C.) (Appendix p. 33) and with the decisions of this court in Davis v. Elmira Savings Bank, 161 U. S. 275, 283, 284, 286; Easton v. Iowa, 188 U. S. 220, 229; and Cook County National Bank v. United States, 107 U. S. 445. "But a National bank is subject to State law unless that law interferes with the purposes of its creation, or destroys its efficiency, or is in conflict with some paramount Federal law." Lewis v. Fidelity Company, 292 U. S. 559, 566. The complete Bank Collection Code is printed in the appendix to the Petitioner's brief in case No. 338, Jennings v. U. S. F. & G. (pages 41 to 58), together with a foreword and comment, section by section by its proponents.

Section 13 (Appendix p. 33) is designated by its framers "Insolvency and Preferences." Subdivision 1 of Section 13 becomes effective "When the drawee or payor of

any other agent collecting bank shall fail or be closed for business." Subdivision 2 of Section 13 becomes effective when the "drawee or payor shall fail or close for business as above." Subdivision 3 of Section 13 becomes effective "Where an agent collecting bank other than the drawee or payor shall fail or be closed for business as above."

Under the plain language of the Section the trust provided therein does not come into being except in the event of insolvency. Accordingly the section is void as to National banks under the following excerpt from the opinion of this court in Davis v. Elmira Savings Bank, 161 U. S. 275, 283:

> "It is clear that these two statutes cover exactly the same subject matter. Both relate to insolvent banks; both ordain that the right of preference on the one side and the duty of ratable distribution on the other shall only result from insolvency; both cover the assets of such banks coming, after insolvency, into the hands of the officer or person authorized to administer them. It is equally certain that both statutes relate to the same duty on the part of the officer of the insolvent bank; the one directs the representative to make a ratable distribution; the other requires, if necessary, the application of the entire assets to payment in full, by preference and priority over all others of a particular and selected class of creditors therein named. We have, therefore, on the one hand, the statute of the United States, directing that the assets of an insolvent national bank shall be distributed by the Comptroller of the Currency in the manner therein pointed out, that is, ratably among the creditors. We have on the other hand, the statute of the State of New York giving a contrary command. To hold that the State statute is operative is to decide that it overrides the plain text of the Act of Congress. This results, not only from the fact that the two statutes, as we have said, cover the same subject-matter, and relate to the same duty, but also because there is an absolute repugnancy between their provisions, that is, between the ratable distribution, commanded by Con-

gress, and the preferential distribution directed by the law of the State of New York."

The conclusion of the court below that Section 13 of the Bank Collection Code is inapplicable to National banks is supported by the following Federal and State decisions:

In *City of Pleasantville v. Pleasantville National Bank* (unreported) the United States District Court, District of N. J. held Section 13 of the Bank Collection Code inapplicable to National banks. In his opinion (App. 35) District Judge Avis says:

"A reading of the Davis v. Elmira Savings Bank case demonstrates conclusively that the assets of a National bank at the time of insolvency are to be distributed under the acts of Congress, and that, although the transactions of a National bank are subject to state law, in all cases where not in conflict with the Federal law, the effort of a State to control the distribution amongst creditors is in direct conflict with the Federal statute. Assets must be disposed of in accordance with the National Bank Act, as construed by the Federal courts.

*If a State, through its law-making power, were permitted to direct how the assets of an insolvent bank should be paid, there would be a constant conflict, and. under the provisions of State laws, preferences and priorities might dispose of all of the assets of an insolvent National bank.*

It is apparent that the New Jersey statute invoked in this case is in conflict with the Federal law, and the bill of complaint in the instant case failing to show equity under the acts of Congress and the interpretation thereof by the United States courts, the motion to strike the bill will be granted, and the bill of complaint will be dismissed." (Italics inserted)

The findings of fact, conclusions of law and decree of the District Court of the United States for the District of Colorado in the case of Federal Reserve Bank of Kansas City

versus First National Bank of Delta, Colo., insolvent (unreported) (App. 45) support the decision of the court below. In the conclusions of law filed in that case the court held with reference to a statute similar to Section 13 of the Bank Collection Code:

> "'Chapter 63, Session Laws of Colorado 1925, providing for preferred payments upon the insolvency of banks, cannot be applied to prevent the ratable distribution provided for by the statutes of the United States to creditors of insolvent National banks;"

In a well considered unreported opinion in the case of Edward Allen Pierce, et al. v. Capital National Bank of Lansing (App. 51) the Circuit Court of Ingham County Michigan held Section 13 of the Bank Collection Code inapplicable to a National bank. To quote from the court's opinion:

> *"It will be noted that the statute, by its specific terms, does not contemplate that a trust shall be impressed on the assets of a bank in favor of the payee of a check unless the bank shall 'fail or close for business.'* Assuming for the moment that it was the intention of the State legislature that the statute should apply to National banks, may the clause quoted be upheld? On behalf of the defendant it is insisted that on the failure or closing of a National banking institution all matters pertaining to its liquidation are governed exclusively by Federal law. Reliance is placed on the decision of the Supreme Court of the United States in Easton v. Iowa, 188 U. S. 220, where the general conclusion was announced that the control of the business of National banks and what shall be done in the event of failure or suspension of operation is governed by Federal statute and that it is not competent for a State legislature to in any way interfere. Attention is called also to the decision of the Michigan Supreme Court in People v. Fonda, 62 Mich., 401.
>
> It seems apparent that the trust relationship, and consequent preference, as defined by the Michigan statute

on which plaintiffs rely must necessarily be involved, if at all, in the event of the liquidation of the assets of a bank. The reference to the failure or closing of a bank indicates that the legislature had such a situation in mind. The trust relationship contemplated does not come into being except in the event of failure or suspension, which must of course be followed by liquidation in some form. In the case of a National bank the acts of Congress govern and undoubtedly are exclusive of any right of control or direction by State authorities. The conclusion necessarily follows that the act of the Michigan Legislature may not be construed as applicable to National banks that have failed or suspended banking operations." (Italics inserted)

The Supreme Court of New York, Appellate Division, discusses the various sections of the Bank Collection Code in its opinion in Jones v. Board of Education, 272 N. Y. S. 5 and at page 14 makes the following comment on the section relied on by the petitioner:

"It may be that its officers were under the impression that it had a right of preference in the distribution of the assets of the Pelham National Bank by virtue of section 350-L of Chapter 589 of the Laws of 1929. If they so believed, they were in error, because there are no preferences among creditors of a National bank. Its assets must be divided ratably among its creditors. Title 12, Banks & Banking, Sec. 194 U. S. Code (12 U. S. C. A. Sec. 194); Davis v. Elmira Savings Bank, 161 U. S. 275, S. Ct. 502, 40 L. Ed. 700."

Also, the recent and as yet unreported opinion of the Circuit Court of Appeals for the Fourth Circuit in Royal Mfg. Co. vs. Spradlin, Receiver, decided Nov. 19, 1934 (Appendix p. 56) is in complete accord with the decision of the court below.

We find but one case involving a National bank that gives the petitioner any assistance,—that of Prudden & Company v. First National Bank of Secaucus, Court of Chancery of

New Jersey, 170 Atl. 860. This decision denies the claimant a right of priority under the general equitable principles urged by the petitioner herein but holds Section 13 of the Bank Collection Code applicable to a National bank. We submit that this decision is clearly contrary to the authorities herein cited. At a later date a petition in aid of execution was filed in the State Court, joining the Conservator in the action for the first time. The action was then removed to the United States District Court, District of New Jersey wherein it is now pending, and a petition to remand denied by District Judge Avis. If Judge Avis can now consider the whole case on the merits it is believed the claim will be classified as general only under his decision in City of Pleasantville v. Pleasantville National Bank, *supra*, p. 21 (App. 35).

In the comment on Section 13 of the Code the framers state: "The purpose of this section is to establish uniform rules based on the better reasoned decisions." We vigorously disagree with the conclusion that the State decisions, contrary to the Federal rule, are the better reasoned decisions on this question. In our opinion this statement is completely refuted by the excellent Federal decisions herein cited, including:

Larabee Flour Mills v. First National Bank, 13 Fed. (2nd) 330, Cert. denied 273 U. S. 727.
Hirning v. Federal Reserve Bank, 52 Fed. (2nd) 382.
First Nat. Bank vs. City of Miami, 69 Fed. (2nd) 346.
Harmer v. Rendleman, 64 Fed. (2nd) 422.

We direct special attention to the articles discussing in detail the various sections of the Bank Collection Code, by Wayne L. Townsend, Professor of Law, Western Reserve University, in the Tulane Law Review, December, 1933, February, 1934, and April, 1934. We are in complete accord with Professor Townsend's criticism of Section 13 of the Code and substantial excerpts therefrom are set out in the appendix, pages ~~33, 34.~~ 61 to 66

*Even if the State Legislature had (which we deny) by the use of plain language, affixed a lien to the collecting bank's assets, prior to suspension, by the provisions of Section 13 of the Bank Collection Code the result would be the same—a general claim only,* for the reason that a National bank is without power to give security for a *private* deposit. Texas & Pacific Railroad v. Pottorff, 291 U. S. 245. An attempt to secure a *private* depositor or his assignee by lien or otherwise would be absolutely void. In the instant case the collection proceeds consisted of a check drawn on the now insolvent National bank.

When the note debtor presented the check and received the note the check was necessarily presented and accepted by the bank for payment. Whether or not the drawer's account was charged is of no consequence as the bookkeeping entries, which do not fix the rights of the parties in this instance, could be made today. As a result of this transaction the *legal position of the petitioner is that of assignee of a private deposit balance.* The state statute could give no power to a National bank; consequently it would be inapplicable to such a bank. The National Bank Act empowers National banks to give security for public deposits; consequently the petitioner receives no assistance from this court's opinion in Lewis v. Fidelity & Deposit Company, 292 U. S. 559. In Royal Manufacturing Company v. Spradlin, 6 Fed. Sup. 98, the District Court allowed a priority claim against an insolvent National bank on the lien theory, the North Carolina statute involved (Sec. 218 (c)(14) N. C. Code 1927) being substantially different and much more favorable to the trust claimant's contentions than any provision of the Bank Collection Code. The proposition stated in this paragraph was urged in the bank Receiver's brief on appeal. The Circuit Court of Appeals for the Fourth Circuit in reversing the District Court and classifying the claim as general only, in its very recent and as yet unreported opinion dated November 19, 1934 (Parker, C. J.) (Appendix p. 56) said:

"It is clear, we think, that even if this proviso be construed as having relation to solvent banks as distinguished from those in liquidation, it cannot affect National banks. It has been held that these banks have no power to pledge their assets to secure a private deposit (Texas Pac. Ry. v. Pottorff, 291 U. S. 245, 253); and one of the reasons for this holding is that to permit such pledge would be inconsistent with many provisions of the National Bank Act which are designed to insure a ratable distribution of assets among creditors. *The same reasoning would forbid the creation of a lien on assets as security for funds collected. And, of course, if the creation of such a lien be beyond the powers of the bank, it could not be created by act of the State legislature; for the legislature could not provide that action on the part of the bank should give rise to a lien which the bank, by reason of the limitations imposed upon it by act of Congress, was powerless to create.*" (Italics inserted)

In the instant case as well as in the North Carolina case the trust claimant places much reliance on the opinion of this court in Lewis v. Fidelity & Deposit Company, *supra*. But as Judge Parker states in his opinion in Royal Manufacturing Company v. Spradlin:

"*The case of Lewis v. Fidelity & Deposit Co.*, 292 U. S. 559, *relied upon by appellee, is in reality an authority against its position.* In that case a statute of Georgia, creating a general lien on the assets of banks as security for deposits of state funds, was held to have application to a National bank merely because the act of Congress of June 25, 1930, c. 604, 46 Stat. 809, 12 U. S. C. A. 90, authorized a National bank to give security for a deposit of public funds of the same kind as authorized by State law for State banking institutions. *The Supreme Court said that no lien under the Georgia statute arose in 1928 when the deposit was made, and that the judgment of the court below sustaining the lien would have been reversed but for the enactment by Congress of the act of 1930. See p. 564. Here there is no act of Congress authorizing the creation of a lien on*

*the assets of a national bank as security for collections; and the act of the North Carolina legislature can no more create a lien on the assets of a National bank than could the Georgia statute without the aid of the Act of 1930.*" (Italics inserted)

To avoid the classification as general only, given its claim by the principles discussed under (A) and (B) above, the petitioner relies on two theories which can be summarized as follows:

*Point 1.* The decision of the court below requiring an identifiable res as a condition precedent to the creation of a trust is erroneous, and equity looking to substance rather than form will consider the transaction as though the note debtor had cashed its check, received the proceeds over the counter and redelivered the same to the bank as a special deposit for the purpose of paying the petitioner's note. To support these contentions the petitioner relies on Blakey v. Brinson, 286 U. S. 254; Davis v. McNair, 48 Fed. (2nd) 494; City of Miami v. First National Bank, 58 Fed. (2nd) 561, and Northwestern Lumber Co. v. Scandinavian American Bank, 130 Wash. 33.

*Point 2.* Section 13 of the Bank Collection Code affixes a lien to the collecting bank's assets prior to suspension, consequently the court below erred in finding that this section is in conflict with the Act of Congress (12 U. S. C. A. 194) and with the decision of this court in Davis v. Elmira Savings Bank, 161 U. S. 275. To support this contention the petitioner relies on Jennings v. U. S. F. & G., 4 Fed. Sup. 569, affirmed 71 Fed. (2nd) 618; Royal Manufacturing Co. v. Spradlin, 6 Fed. Sup. 98; and Lewis v. Fidelity & Deposit Company, 292 U. S. 559.

The respondent admits that the law concerning the establishment of trust claims against Receivers of insolvent National banks is correctly stated in the final decisions of all the Federal cases cited in the petitioner's brief, except Schumacher v. Harriett, 58 Fed. (2nd) 817, inapplicable to

the instant case, and fully discussed in the petitioner's brief in Adams v. Champion, No. 374, set for argument immediately after this case. The respondent denies that the final decisions in any of the Federal cases cited, except Schumacher v. Harriett, give the petitioner any assistance in establishing the trust claim involved in this case.

Replying to Point I above, the necessity for a res as a condition precedent to a trust is conclusively established in the Federal courts by the decision of this court in Blakey v. Brinson, *supra*, plus the decisions discussed in this brief, pages 7 to 12. We know that in the instant case the note debtor did not cash its check and redeliver the cash to the bank in payment of the note. That Federal Equity Courts will not resort to fiction where to do so would adversely affect the rights of depositors of an insolvent National bank whose equities are at least equal to those of the petitioner seems settled by the decisions discussed in this brief, pages 13 to 16. In Blakey v. Brinson, *supra*, relied on by the petitioner, this court was asked to resort to substantially the same fiction as that urged by the petitioner. The unanimous reversal of the Appellate Court's decision, which decision was based on the "as if" doctrine, is a complete answer to the petitioner's suggestion that this court in Blakey v. Brinson, "passively approved" the "as if" doctrine. The decision of the Circuit Court of Appeals for the Fifth Circuit in Davis v. McNair, 48 Fed. (2nd) 494, relied on by the petitioner, was reversed in principle in 68 Fed. (2nd) 935, the trust claim finally allowed being based on a res traceable, in changed form, into the hands of the bank Receiver. Likewise the decision of the Circuit Court of Appeals for the Fifth Circuit in City of Miami v. First National Bank, 58 Fed. (2nd) 561, relied on by the petitioner, was reversed in an excellent later opinion reported in 69 Fed. (2nd) 346. In reversing this decision the Circuit Court of Appeals was fully aware of the action of this court in Blakey v. Brinson, *supra*, because thereafter the case was twice certified to this court and argued on one occasion

before the opinion in 69 Fed. (2nd) was written. The State decision in Northwestern Lumber Company v. Scandinavian American Bank, relied on by the petitioner, and all similar State decisions are contrary to the Federal rule as held in Larabee Flour Mills v. First National Bank, 13 Fed. (2nd) 330, certiorari denied 273 U. S. 727, wherein the court says on page 331: "It is difficult to explain or understand by what equitable right one who has not contributed to the creation of a fund should be given a special and superior interest therein though some of the State courts seem to so hold."

Replying to Point 2 above, the plain language of Section 13 of the Bank Collection Code evidences that it was intended to become effective only after the bank's insolvency, as discussed in this brief, pages 19 to 24. Accordingly Section 13 is void as to National banks under the rule stated by this court in Davis v. Elmira Savings Bank, *supra*. The case of Jennings v. U. S. F. & G. Co., 4 Fed. Sup. 569, affirmed 71 Fed. (2nd) 618, relied on by the petitioner, gives it no assistance because Section 13 of the Bank Collection Code was not relied on by the courts below in allowing the trust claim. Sections 1, 2, 9 and 10 of the Bank Collection Code alone are involved in that case. Furthermore the trust claim involved has not been finally allowed and is now before this court, set for argument immediately prior to the instant case. The case of Royal Manufacturing Co. v. Spradlin, 6 Fed. Sup. 98, relied on by the petitioner, was reversed and the claim classified as general only by the Circuit Court of Appeals for the Fourth Circuit on November 19, 1934. (App. 56) The decision of this court in Lewis v. Fidelity & Deposit, 292 U. S. 559, relied on by the petitioner, is in fact a case against its contentions as discussed by Circuit Judge Parker in his opinion in Royal Manufacturing Company v. Spradlin, *supra*. (App. 56)

At page 16 of its brief the petitioner states that the court below does not attempt to indicate in what respect Section 13 of the Bank Collection Code is in conflict with Section

194, Title 12, U. S. C. A. But the opinion of the court below (R. 44) states:

> "It is true that the state statute (Sec. 350-1, subd. 2, art. 19-A, Negotiable Instruments Law) expressly grants a preference under the circumstances at bar upon the insolvency of the drawee or payor bank, but state legislation is unavailing if contrary to the Act of Congress (12 U. S. C. A. Sec. 194) as construed by the Federal courts. On the authorities above mentioned and many others which might be cited, we think it is."

The petitioner asserts that the validity of the bank collection code should be upheld by this court if it is at all possible to reconcile its provisions with the Act of Congress. To this the bank Receiver answers that all provisions of the Bank Collection Code, except Section 13, are uniformly applied in the liquidation of insolvent National banks, hence the one question for consideration in this connection is whether or not Section 13 of the Code conflicts with the pro rata distribution mandate of Congress. That there is such a conflict which makes the section inapplicable to insolvent National banks is established by the two decisions of Davis v. Elmira Savings Bank, 161 U. S. 275, and Royal Manufacturing Co. v. Spradlin. (App. 56)

The National banking laws, and related acts, together with a long line of decisions by this Court clearly evidence an intent to safeguard the assets of insolvent National banks in liquidation, thus insuring a maximum distribution to the depositors and creditors. Taxes due the United States which would be paid from the funds of depositors are abated. (Sec. 570, Title 12 U. S. C. A.) The preference given the United States as a sovereign against insolvent estates generally is made inapplicable to such banks. Suits to wind up the affairs of such banks are made cognizable in the Federal courts, *independent of the amount involved.* A separate system of liquidation is provided, independent of the Bankruptcy Act. Sales and compromises of assets can be made only after court approval and advances to protect

assets can be made only upon approval by the Secretary of the Treasury. Annual reports of the results of liquidation are required to be made to Congress. While the claimants in the instant case and in the companion cases Nos. 358 and 374 assert ownership of property taken over by the Receivers they are in fact, as established by the record, seeking to be made whole from the funds of the depositors. To permit any class of claimants to be paid in full from the funds of depositors, when such funds were in no way enriched by the claimants' transaction, would flagrantly violate the principles heretofore adhered to in liquidating insolvent National banks.

The depositors and other creditors of this insolvent National bank—the beneficial owners of all its assets—will suffer a very substantial loss because of their dealings with the bank. The equities of these depositors and other creditors are at least equal to those of the petitioner. The record establishes that no part of the assets that passed to the Receiver came into the bank as a result of the petitioner's transaction. All of the assets that passed to the Receiver came into the bank as the result of transactions other than the petitioner's. None of the assets of the bank were segregated to respond for the petitioner's claim under the provisions of the Bank Collection Code and no segregation was intended by that statute. Under these circumstances the court below correctly found for the bank Receiver when it classified the petitioner's claim as general only.

## CONCLUSION.

The respondent believes that the foregoing discussion establishes that a trust never came into existence in the instant case; that the assets of this now insolvent National bank were not augmented in any way by the collection of the petitioner's item; that a tracing of proceeds into the assets acquired by the bank Receiver is impossible and that the rights of the petitioner against the bank Receiver are

in no way increased by the provisions of Section 13 of the Bank Collection Code. A reversal of the decision of the court below may be construed to mean the overruling of the great body of Federal decisions requiring the existence of a trust res and the tracing of proceeds to the Receiver or a holding that a State statute in conflict with the National Bank Act can be made applicable to the liquidation of an insolvent National bank.

It is submitted that the decision of the court below should be affirmed.

Respectfully submitted,

JOHN F. ANDERSON,
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*Attorneys for Respondent.*

F. G. AWALT,
GEORGE P. BARSE,
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*Of Counsel.*

## APPENDIX.

U. S. C. A. Title 12, Sec. 194.

DIVIDENDS ON ADJUSTED CLAIM; DISTRIBUTION OF ASSETS. From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held. (R. S. Sec. 5236)

Section 13, Bank Collection Code (Negotiable Instruments Law of New York, section 350-1, subd. 2, art. 19-A)

INSOLVENCY AND PREFERENCES. 1. When the drawee or payor, or any other agent collecting bank shall fail or be closed for business by (official to be designated) or by action of the board of directors or by other proper legal action, after an item shall be mailed or otherwise entrusted to it for collection or payment but before the actual collection or payment thereof, it shall be the duty of the receiver or other official in charge of its assets to return such item, if same is in his possession, to the forwarding or presenting bank with reasonable diligence.

2. Except in cases where an item or items is treated as dishonored by non-payment as provided in Section 11, when a drawee or payor bank has presented to it for payment an item or items drawn upon or payable by or at such bank and at the time has on deposit to the credit of the maker or drawer an amount equal to

such item or items and such drawee or payor shall fail or close for business as above, after having charged such item or items to the account of the maker or drawer thereof or otherwise discharged his liability thereon but without such item or items having been paid or settled for by the drawee or payor either in money or by an unconditional credit given on its books or on the books of any other bank, which has been requested or accepted so as to constitute such drawee or payor or other bank debtor therefor, the assets of such drawee or payor shall be impressed with a trust in favor of the owner or owners of such item or items for the amount thereof, or for the balance payable upon a number of items which have been exchanged, and such owner or owners shall be entitled to a preferred claim upon such assets, irrespective of whether the fund representing such item or items can be traced and identified as part of such assets or has been intermingled with or converted into other assets of such failed bank.

3. Where an agent collecting bank other than the drawee or payor shall fail or be closed for business as above, after having received in any form the proceeds of an item or items entrusted to it for collection, but without such item or items having been paid or remitted for by it either in money or by an unconditional credit given on its books or on the books of any other bank which has been requested or accepted so as to constitute such failed collecting or other bank debtor therefor, the assets of such agent collecting bank which has failed or been closed for business as above shall be impressed with a trust in favor of the owner or owners of such item or items for the amount of such proceeds and such owner or owners shall be entitled to a preferred claim upon such assets, irrespective of whether the fund representing such item or items can be traced and identified as part of such assets or has been intermingled with or converted into other assets of such failed bank.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

| | |
|---|---|
| Between<br>THE CITY OF PLEASANTVILLE, a municipal corporation of the County of Atlantic and State of New Jersey, *Complainant*,<br>And<br>THE PLEASANTVILLE NATIONAL BANK by ALONZO TWEEDALE, Receiver, *Defendant*. | IN EQUITY<br>E-4780<br><br>On Bill, etc.<br>On Motion to strike bill of complaint. |

G. ARTHUR BOLTE, For the Motion

L. D. CHAMPION, Opposed

MEMORANDUM

AVIS, *District Judge:*

This action was originally instituted in the Court of Chancery of New Jersey, and has been removed to this court on application of defendant.

The facts, generally, as alleged in the bill of complaint are: Complainant, a municipal corporation of the State of New Jersey, on February 2, 1933, deposited for collection with the First National Bank of Pleasantville, New Jersey (hereinafter called First National Bank) a certain check, drawn to its order, for the sum of $3212.94. Marvin R. Martin, Custodian of School Funds of the City of Pleasantville, was the drawer of the check, and it was made payable at the Pleasantville National Bank of Pleasantville, New Jersey (hereinafter called Pleasantville Bank). Both of these banks were located in the same city, and it was the custom of the banks to clear between themselves on each banking day. Items for collection were forwarded from one bank to the other, and at the end of the day's business the debtor bank, in some way, paid to the creditor bank, the balance due.

The check of complainant was, with other items for collection, forwarded by the First National Bank to Pleasantville Bank, and, upon settlement of the accounts, it appeared that First National Bank's credit was $3505.07, and Pleasantville Bank's credit was $777.16, leaving a balance due to First National Bank of $2727.91. For this amount the Pleasantville Bank forwarded to First National Bank its draft on the Federal Reserve Bank of Philadelphia. Before the amount of this draft was credited to First National Bank, the Pleasantville Bank became insolvent and a receiver was appointed by the Comptroller of the Currency. The draft was never paid.

When the check of complainant was received at Pleasantville Bank, upon which it was drawn, it was marked paid and charged to the account of the drawer.

Complainant's bill alleges that, under the circumstances, it has a right to have a trust impressed on the assets of the Pleasantville Bank to the extent of $2495.34, being its proportionate share of the balance transmitted by draft to First National Bank upon the settlement of the daily transactions between the two banks, and prays for a decree to that effect.

Defendant has moved to strike the bill of complaint, claiming that the facts set forth therein are not legally sufficient to entitle the complainant to relief.

Counsel for the motion argues—

(1) That the facts alleged do not create a trust.

(2) That the funds in the hands of the receiver were not and are not augmented by any claimed trust.

(3) That no funds arising from the transaction were traced into the hands of the receiver.

Counsel for complainant opposes these contentions, and also sets up a statute of the State of New Jersey (known as the Bank Collection Code) which, he insists, is controlling. This statute reads as follows:

> "(2) Except in cases where an item or items is treated as dishonored by non-payment as provided in

section 11, when a drawee or payor bank has presented to it for payment an item or items drawn upon or payable by or at such bank and at the time has on deposit to the credit of the maker or drawer an amount equal to such item or items and such drawee or payor shall fail or close for business as above, after having charged such item or items to the account of the maker or drawer thereof or otherwise discharge his liability thereon but without such item or items having been paid or settled for by the drawee or payor either in money or by an unconditional credit given on its books or on the books of any other bank, which has been requested or accepted so as to constitute such drawee or payor or other bank debtor therefor, the assets of such drawee or payor shall be impressed with a trust in favor of the owner or owners of such item or items for the amount thereof, or for the balance payable upon a number of items which have been exchanged, and such owner or owners shall be entitled to a preferred claim upon such assets, irrespective of whether the fund representing such item or items can be traced and identified as part of such assets or has been intermingled with or converted into other assets of such failed banks."

(Supplement to Comp. State of New Jersey 1925-1930, Sec. 13, p. 94.)

Two principles of law are involved: The general theory of the Federal courts as to the creation of a trust and preference against the assets of an insolvent national bank, and the applicability and effect of the New Jersey statute.

To establish a preference against the funds of an insolvent bank, it must appear that there was some agreement of trust, express or implied; that the assets of the bank coming to the receiver were augmented, and the funds traced into some particular property or money turned over to the receiver.

Complainant claims that a trust was implied by reason of the fact that the amount of the check was charged to the account of the drawer, and that on the date of such charge

and the execution and delivery of the draft, and up to the hour of insolvency, the Pleasantville Bank had in its possession sufficient funds to pay and satisfy the amount due to complainant.

There is considerable confusion in the various Federal and State courts on the question here at issue, and each case appears to be decided upon the particular facts involved.

The question as to the liability of an agent collection bank is not raised in the instant suit, as was decided in the case of *Federal Reserve Bank of Richmond v. Malloy*, 264 U. S. 160, nor is the liability of a Federal Reserve Bank claimed, as decided in *Early, Receiver, v. Federal Reserve Bank of Richmond*, 281 U. S. 84.

The bill alleges that the check was deposited "for collection", and, therefore, the question of the relation of creditor and debtor does not arise, as decided in *City of Douglas v. Federal Reserve Bank of Dallas*, 271 U. S. 489 and in *Equitable Trust Company, Trustee, v. Rochling*, 275 U. S. 248.

I am satisfied that, under the Federal Decisions, no trust was created, unless the complainant's bill sets forth facts tracing the proceeds of the collection into the hands of the receiver, or that the assets which have come into his hands have been augmented.

This doctrine is established in the case of *Lifsey v. Goodyear Tire & Rubber Co., Inc.* (C. C. A. 4), 67 F. (2d) 82. The decision in that case, with the cases cited, shows conclusively that the facts alleged in the bill of complaint in the instant case are not sufficient to create a trust. See, also, *Thompson v. Common School District No. 54, in Twin Falls County, Idaho* (C. C. A. 9), 67 Fed. (2d) 284.

It is true that in the case cited by counsel for complainant, to wit, *City of Miami v. First Nat. Bank of St. Petersburg, Fla.*, (C. C. A. 5) 58 F. (2d) 561, a contrary doctrine was established, and upon facts very similar to those in the instant case.

However, after the decision of the City of Miami case, the Supreme Court in the case of *Blakey, Receiver, v. Brinson*, 286 U. S. 254, in reversing the decision of the Fourth Circuit in the case of *Schumacher v. Brinson*, 52 Fed. (2d) 821, established the law, which is in conflict with the decision in the City of Miami case. It is apparent that the conclusions of the court in the case of Lifsey v. Goodyear Tire & Rubber Co., *supra*, follows the Supreme Court, and in effect, the case of City of Miami v. First Nat. Bank of St. Petersburg, *supra*, is thereby overruled.

The case of *Schumacher v. Harriett* (C. C. A. 4), 52 Fed. (2d) 817, is distinguishable from the instant case in that in that case certain funds were paid to the bank for a specific purpose and upon a specific trust. The funds coming into the hands of the receiver were augmented thereby, and the deposit was traced into the general assets.

In *Blakey v. Brinson*, 286 U. S. 254, the Supreme Court decided the disputed question as to whether the charging of a depositor's account with a certain amount of money and crediting that amount in a general bond account of the bank, upon an arrangement contemplating the purchasing of bonds for the depositors, would create a trust. The court held that it would not.

The Court said:

> "The court below thought that the legal consequence to be attributed to the debiting of the account with the supposed purchase price of the bonds was the same as if the respondent had cashed a check for the amount and had then proceeded to hand the money back to the bank under a specific agreement between him and the bank that the money was to be held as a special fund, for the sole purpose of completing the purchase. This view is not without support. See Davis v. McNair, 48 F. (2d) 494; State v. Grills, 35 R. I. 70, 75; 85 Atl. 281; Northwest Lumber Co. v. Scandinavian American Bank, 130 Wash. 33; 225 Pac. 825; State v. American Exchange Bank, 112 Neb. 834; 201 N. W. 895. See, Contra, Beard v. Independent District of Pella City,

88 Fed. 375, 381; Mark v. Westlin, 48 F. (2d) 609; First National Bank v. Williams, 15 F. (2d) 585; Howard v. People, 229 Ill. App. 23; Miller v. Viola State Bank, 121 Kan. 193; 246 Pac. 517; People v. Merchants & Mechanics' Bank of Troy, 78 N. Y. 269; Hecker-Jones-Jewell Milling Co. v. Cosmopolitan Trust Co., 242 Mass. 181; 136 N. E. 333. Such a procedure, if actually carried out, might afford a basis, which is lacking here, for the inference that respondent, no longer content with the role of creditor, had sought to establish a trust fund. But the mere debiting of his account, without more, for the reimbursement of the bank for the obligation which it was supposed to have incurred or paid, lends no support to such an inference. The cancellation of the credit balance by the debit neither suggests any intention to establish a trust nor points to any identifiable thing which could be the subject of it.

The debit entry may be disregarded, because respondent's assent to it was procured by a false statement; but the only consequence is that his status as a creditor is unaffected and he is entitled only to share in the funds of the bank on an equal footing with other creditors who similarly are the victims of its insolvency."

(286 U. S. 262-3)

The facts in the instant case are similar. The Pleasantville Bank charged the amount of the check to the account of Marvin R. Martin, Custodian of the School Funds, its depositor, and, in effect, credited the amount to the account of the First National Bank.

There remains to be considered the applicability and effect of the New Jersey statute.

The distribution of the funds of an insolvent national bank is provided for in 12 U. S. C. A., sec. 194, as follows:

"From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money

so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

The settled policy of the Federal courts has been to consider trust funds as the property of the cestui que trust, and, if the trust is established under the law, to be payable prior to the distribution provided for in this statute.

In the case of *McClellan v. Chipman*, 164 U. S. 347, the court, as to the conflict of national and state laws relating to national banks, said:

"The only Federal question for our consideration is whether there was conflict between the statutes of the United States and the provisions of the general law of the State of Massachusetts referred to and heretofore fully set out. Two propositions have been long since settled by the decisions of this court:

First. National banks are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts and their liability to be sued for debts, are all based on the state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional. National Bank v. Commonwealth, 9 Wall. 362.

Second. National Banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a State to define their duties, or control the conduct of their affairs, is absolutely void, whenever such attempted exercise of authority expressly conflicts with

> the laws of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiencies of these agencies of the Federal government to discharge the duties for the performances of which they are created. Davis v. Elmira Savings Bank, 161 U. S. 275, 283.
>
> These two propositions, which are distinct yet harmonious, practically contain a rule and an exception, the rule being the operation of general state laws upon the dealings and contracts of national banks, the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States."
>
> (164 U. S. 356.)

The Supreme Court in the case of *First National Bank of San Jose v. State of California*, 262 U. S. 366, held as follows:

> "A state law providing for the escheat to the State of bank deposits after they have remained intact and unclaimed for more than twenty years, when no notice of his residence has been filed with the bank by the depositor or any claimant, is void as applied to deposits in National banks."
>
> (Syllabus.)

In the case of *First National Bank in St. Louis v. State of Missouri*, 263 U. S. 640, it was held that a state statute prohibiting the establishment of branch banks was not in conflict with federal law, and sustained the state law as regulatory of national banks, because "Under the National Bank Law, power to establish branches is withheld." (Syllabus 3.)

On the general proposition the Court in that case said:

> "National banks are brought into existence under federal legislation, are instrumentalities of the Fed-

eral Government and are necessarily subject to the paramount authority of the United States. Nevertheless, national banks are subject to the laws of a State in respect to their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States."

(263 U. S. 656)

Counsel for complainant cites the case of *Federal Reserve Bank of Richmond v. Malloy,* 264 U. S. 160, as authority for his contention that the state statutes control. In that case the court did apply the Federal statue which defined the rights of depositors and the business operation of the bank.

In all of the foregoing cases, however, no question of insolvency or distribution of assets by a receiver, was involved.

The New Jersey statute attempts to regulate the distribution of the assets of an insolvent national bank.

In the case of *Davis v. Elmira Savings Bank,* 161 U. S. 275, the court held that a statute of the State of New York provided for the payment by the receiver of an insolvent national bank, in the first place, of deposits in the bank by savings bank, when applied to an insolvent national bank, was in conflict with section 5236 of the Revised Statutes of the United States (12 U. S. C. A. sec. 194), directing the Comptroller of the Currency to make ratable dividends of the money paid over to him by such receiver, on all claims proved to his satisfaction, or adjudicated in a court of competent jurisdiction, and was, therefore, void when attempted to be applied to a national bank.

See also *Easton v. Iowa,* 188 U. S. 220, and *Yates v. Jones National Bank,* 206 U. S. 158.

A reading of the Davis v. Elmira Savings Bank case demonstrates conclusively that the assets of a national bank at the time of insolvency are to be distributed under the acts

of Congress, and that, although the transactions of a national bank are subject to state law, in all cases where not in conflict with the federal law, the effort of a State to control the distribution amongst creditors is in direct conflict with the Federal statute. Assets must be disposed of in accordance with the National Bank Act, as construed by the Federal Courts.

If a State, through its law-making power, were permitted to direct how the assets of an insolvent bank should be paid, there would be a constant conflict, and, under the provisions of state laws, preferences and priorities might dispose of all of the assets of an insolvent national bank.

It is apparent that the New Jersey statute invoked in this case is in conflict with the Federal law, and the bill of complaint in the instant case failing to show equity under the acts of Congress and the interpretation thereof by the United States courts, the motion to strike the bill will be granted, and the bill of complaint will be dismissed.

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Since preparing the above memorandum, my attention has been called to the case of *The First National Bank of St. Petersburg, Florida, v. City of Miami,* decided by the United States Circuit Court of Appeals for the Fifth Circuit on March 1, 1934 (not yet officially reported).

This later decision, in effect, overrules the construction placed thereon by counsel for complainant in citing the decision of the same court in the case of City of Miami v. First National Bank of St. Petersburg, *supra,* as it applies to the facts set forth in the bill of complaint in the instant case. As a precedent and authority for contention of complainant, the decision in the earlier case is ineffective.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLORADO.

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| FEDERAL RESERVE BANK OF KANSAS CITY, *Complainant,* *vs.* THE FIRST NATIONAL BANK OF DELTA, COLORADO, ARCH R. JACK, RECEIVER OF THE FIRST NATIONAL BANK OF DELTA, COLORADO, *Defendants.* | No. 9828 IN EQUITY. |

## FINDINGS OF FACTS AND CONCLUSIONS OF LAW.

This cause came on to be heard on the 9th day of June, 1932, upon the complaint, answer, agreed statement of facts and evidence offered by the complainant, the cause was duly argued by counsel, and the Court, being now fully advised in the premises, makes the following

### FINDINGS OF FACTS:

1. The complainant, Federal Reserve Bank of Kansas City, is a banking corporation organized and existing under the laws of the United States, with its principal office and place of business in Kansas City, Missouri, and with a branch office at Denver, Colorado.

2. The First National Bank of Delta is a banking corporation organized and existing under and by virtue of the laws of the United States, with its place of business at Delta, Colorado.

3. That The First National Bank of Delta was declared insolvent by resolution of its Board of Directors at 8:00 o'clock P.M. on Friday, September 20, 1929, and defendant Arch R. Jack is the duly appointed, qualified and acting Receiver appointed for the purpose of liquidating the assets of said bank and winding up its affairs.

4. That on and subsequent to September 14, 1929, the Denver branch of said Federal Reserve Bank of Kansas

City forwarded by mail to said The First National Bank of Delta various checks drawn on said The First National Bank of Delta by depositors of said Delta Bank; that four of such remittances were made resulting in claims by said Federal Reserve Bank of Kansas City against The First National Bank of Delta and its Receiver, in the aggregate amount of Eighteen Thousand, Thirty-two and 9/100 ($18,-032.09) Dollars.

5. That said checks forwarded for collection and remittance to The First National Bank of Delta were received by the latter bank on September 18, 19 and 20, 1929, and were in all cases charged to the respective accounts of the drawers thereof in The First National Bank of Delta and were marked paid by the latter bank.

6. That no remittance whatever was made by The First National Bank of Delta for the checks so received on September 18 and 19, 1929, but that The First National Bank of Delta drew its two drafts against its correspondent, The First National Bank of Denver, covering the checks received on September 20, 1929, payable to the order of the Denver branch of the Federal Reserve Bank, which received such drafts on September 23, 1929, but was unable to obtain payment thereon for the reason that The First National Bank of Delta had suspended prior to the time such drafts could be presented for payment, and that payment had been stopped after the closing of said bank.

7. That the Federal Reserve Bank and its Denver branch were acting on behalf of its principals, the banks which forwarded said checks to said Federal Reserve Bank for collection as agent of such banks, under the provisions of Regulation J promulgated by the Federal Reserve Board, and under the terms of its own general letter governing its check collection operations. Said Federal Reserve Bank had authority to send said checks direct to The First National Bank of Delta for collection and to take the drafts of such bank which might be issued in remittance therefor, and said The First National Bank of Delta was required

to, and had agreed to remit for all checks accepted or collected by it received from said Federal Reserve Bank or its Denver branch in cash, or its equivalent.

8. That the claims filed by the Federal Reserve Bank with the defendant Receiver assert the right on the part of the complainant and the owners of the checks on which said claims are based to receive and obtain payment thereof prior to the payment of the claims of general creditors of The First National Bank of Delta; that while defendants deny the right of complainant to preferred claims, they admit that such claims should be allowed as common claims against The First National Bank of Delta.

9. That all of the various checks on which said claims were made by the Federal Reserve Bank were drawn by depositors of The First National Bank of Delta upon the latter bank, and the forwarding thereof by the Federal Reserve Bank and charging them to the depositors did not increase or augment in any way the assets of The First National Bank of Delta.

## CONCLUSIONS OF LAW.

Whereupon, the Court concludes as a matter of law:

1. That Regulation J of the Federal Reserve Board and General Letter D-1 of the Federal Reserve Bank prescribing certain rules under which the Federal Reserve Bank collects such items as those here in evidence do not give rise to any relationship of trust or create any trust fund;

2. There was no increase or augmentation of the assets of The First National Bank of Delta by the forwarding by the Federal Reserve Bank to that bank, for collection, of checks drawn by the depositors of The First National Bank of Delta upon the latter bank, and the charging of such checks to their depositors by the latter bank, and the complainant is not entitled to have its claims, or any of them, allowed as preferred claims, or to payment prior to the general creditors of The First National Bank of Delta;

3. Chapter 63, Session Laws of Colorado 1925, providing for preferred payments upon the insolvency of banks, cannot be applied to prevent the ratable distribution provided for by the statutes of the United States to creditors of insolvent National banks;

4. Complainant is entitled to the allowance of each of said claims, in the respective amounts of Five Thousand, Two Hundred Fifty-eight and 27/100 ($5,258.27) Dollars, Six Thousand, Six Hundred Twenty and 86/100 ($6,620.86) Dollars, One Thousand, Nine Hundred Fifty-two and 84/100 ($1,952.84) Dollars and Four Thousand, Two Hundred and 12/100 ($4,200.12) Dollars as common claims against the Receiver of The First National Bank of Delta.

J. Foster Symes,
*Judge.*

Ex saved.

A True Copy,

Teste:

Charles W. Bishop,
*Clerk.*

By Elsie Pelissier,
*Deputy Clerk.*

(Seal)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLORADO.

| | |
|---|---|
| FEDERAL RESERVE BANK OF KANSAS CITY, *Complainant,* *vs.* THE FIRST NATIONAL BANK OF DELTA, COLORADO, ARCH R. JACK, RECEIVER OF THE FIRST NATIONAL BANK OF DELTA, COLORADO, *Defendants.* | No. 9828 IN EQUITY. DECREE |

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ORDERED, ADJUDGED AND DECREED as follows, viz:

That the complainant has failed to establish the necessary facts to enable it to have its claims allowed as preferred, but is entitled to allowance of such claims as general claims;

That complainant's claims in the sums, respectively, of Five Thousand, Two Hundred Fifty-eight and 27/100 ($5,258.27) Dollars, Six Thousand, Six Hundred Twenty and 86/100 ($6,620.86) Dollars, One Thousand, Nine Hundred Fifty-two and 84/100 ($1,952.84) Dollars, and Four Thousand, Two Hundred and 12/100 ($4,200.12) Dollars, aggregating Eighteen Thousand, Thirty-two and 9/100 ($18,032.09) Dollars, as agent, as alleged in the complaint herein, be established and allowed as common or general claims, and the Receiver of The First National Bank of Delta is ordered to allow and pay them in due course as such;

That defendants have judgment against complainant for their costs in this behalf expended to be taxed by the Clerk.

Done this 28th day of June, 1932.

J. FOSTER SYMES,
*Judge.*

A True Copy,

Teste:

CHARLES W. BISHOP,
*Clerk.*

By ELSIE PELISSIER,
*Deputy Clerk.*

(Seal)

STATE OF MICHIGAN

THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

IN CHANCERY

EDWARD ALLAN PIERCE ET AL., *Plaintiffs*,

v.

CAPITAL NATIONAL BANK OF LANSING, a National banking Association, *Defendant*.

No. 16293

The facts in this case are not in dispute. On the 9th of February, 1933, the plaintiffs, who are copartners, received from the Motor Wheel Corporation of Lansing, Michigan, a check in the sum of approximately fifteen hundred dollars. Said check was deposited for collection with the First National Bank of Detroit, went through the Federal Reserve Bank in the usual course, and on February 11th was duly presented to the defendant, the drawee named in the check. At that time the drawer had sufficient deposits to cover the amount of the check and the defendant charged the drawer's account accordingly. On the same day a check or draft covering the amount of the check in question, together with various other items, was forwarded by defendant to Detroit, but on account of the so-called bank holiday such check or draft did not clear. Since the 11th of February the defendant bank has not been open for the carrying on of a normal banking business and has not made payment to plaintiff.

The action was originally started on the law side of the court, but was transferred in accordance with the statute permitting such action. In the bill of complaint plaintiffs seek a decree to the effect that the amount of the check is a trust fund in the hands of the defendant, asking also that defendant be required to pay to plaintiffs the amount of such check in full, with interest. Defendant denies the ex-

istence of any trust relationship and states further by the answer, which is not controverted, that on the 23rd of March, 1933, which was prior to the institution of suit, a conservator was appointed for the defendant bank by the Comptroller of the Currency in accordance with the Federal statute. As above suggested, plaintiffs' claim of a right to a preference is based on the theory of a trust relationship. Reliance is placed on subdivision 2 of section 13 of act 240 of the public acts of 1931, commonly referred to as the bank collection code. Said subdivision reads as follows:

> "Except in cases where an item or items is treated as dishonored by non-payment as provided in section eleven, when a drawee or payor bank has presented to it for payment an item or items drawn upon or payable by or at such bank and at the time has on deposit to the credit of the maker or drawer an amount equal to such item or items and such drawee or payor shall fail or close for business as above, after having charged such item or items to the account of the maker or drawer thereof or otherwise discharged his liability thereon but without such item or items having been paid or settled for by the drawee or payor either in money or by an unconditional credit given on its books or on the books of any other bank, which has been requested or accepted so as to constitute such drawee or payor or other bank debtor therefor, the assets of such drawee or payor shall be impressed with a trust in favor of the owner or owners of such item or items for the amount thereof, or for the balance payable upon a number of items which have been exchanged, and such owner or owners shall be entitled to a preferred claim upon such assets, irrespective of whether the fund representing such item or items can be traced and identified as part of such assets or has been intermingled with or converted into other assets of such failed bank."

It will be noted that the statute, by its specific terms, does not contemplate that a trust shall be impressed on the as-

sets of a bank in favor of the payee of a check unless the bank shall "fail or close for business". Assuming for the moment that it was the intention of the state legislature that the statute should apply to National banks, may the clause quoted be upheld? On behalf of the defendant it is insisted that on the failure or closing of a National banking institution all matter pertaining to its liquidation are governed exclusively by Federal law. Reliance is placed on the decision of the Supreme Court of the United States in Easton v. Iowa, 188 U. S. 220, where the general conclusion was announced that the control of the business of National banks and what shall be done in the event of failure or suspension of operation is governed by Federal statute and that it is not competent for a state legislature to in any way interfere. Attention is called also to the decision of the Michigan Supreme Court in People v. Fonda, 62 Mich. 401.

It seems apparent that the trust relationship, and consequent preference, as defined by the Michigan statute on which plaintiffs rely, must necessarily be involved, if at all, in the event of the liquidation of the assets of a bank. The reference to the failure or closing of a bank indicates that the Legislature had such a situation in mind. The trust relationship contemplated does not come into being except in the event of failure or suspension, which must of course be followed by liquidation in some form. In the case of a National bank the acts of Congress govern and undoubtedly are exclusive of any right of control or direction to state authorities. The conclusion necessarily follows that the act of the Michigan Legislature may not be construed as applicable to National banks that have failed or suspended banking operations.

Counsel for plaintiffs contend that, without reference to the provisions of the Michigan statute, they are, under general principles of law and equity, entitled to have a preference decree. Such claim rests on the theory of a trust re-

lationship arising under such circumstances as are involved in the case at bar, in favor of the payee of a check with reference to the assets of the drawee bank. Attention is called to the decision of the Circuit Court of Appeals of the Fifth Cir. in Miami v. Nat. Bank of St. Petersburg, 58 Fed. (2d) 561. The Court there applied the law of Florida as established by statute and court decisions. From an examination of the authorities, I am brought to the conclusion that the weight of authority is not in accordance with the holding in the case cited. Rather the general rule seems to be that the trust relationship required to support the allowance of a preference in the distribution of the assets of a closed bank does not arise unless such assets have been augmented as a result of the transaction involved. Blakey, Receiver, v. Brinson, 286 U. S. 254, and cases there cited. The conclusion follows that plaintiffs are not entitled to the preference sought to be enforced in this proceeding.

On the record made in the instant case, questions in addition to those above discussed are presented, but in my opinion it is unnecessary to refer to them at length. The assets on which plaintiffs seek to impress the trust are in the hands of the conservator appointed by the Comptroller of the Currency. The bill of complaint however, seeks no relief against the conservator and he is not made a party. In the law action he sought and obtained leave to intervene but it does not appear that he has acted thereunder. The answer to the bill has been filed by the bank alone.

Decree will enter denying the relief sought.

LELAND W. CARR,
*Circuit Judge.*

State of Michigan, County of Ingham, ss:

I, C. Ross Hilliard, Clerk of the Circuit Court for the County of Ingham, do hereby certify that the above and foregoing is a true and correct copy of Opinion entered October 24, 1933, in the above entitled cause in said Court, as appears of record in my office, and that I have compared the same with the original, and that it is a true transcript therefrom and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Lansing, Michigan, this 9th day of November, A. D. 1934.

C. Ross Hilliard,
*County Clerk.*
By Irene M. Ferris,
*Deputy County Clerk.*

(Seal)

# UNITED STATES CIRCUIT COURT OF APPEALS
# FOURTH CIRCUIT.

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No. 3735.

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W. H. SPRADLIN, Receiver of the ELKIN NATIONAL BANK,
Appellant,

*versus*

ROYAL MANUFACTURING COMPANY, a corporation,
Appellee.

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Appeal from the District Court of the United States
for the Middle District of North Carolina,
at Winston-Salem.

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(Argued October 26, 1934. Decided November 19, 1934.)

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Before PARKER, NORTHCOTT and SOPER, Circuit Judges.

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JOHN J. INGLE and JOHN H. FOLGER for Appellant, and
E. C. BIVENS for Appellee.

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PARKER, Circuit Judge:

This is an appeal from a decree holding a claim of the Royal Manufacturing Company for $3,483.73 to be a lien on the assets of the failed Elkin National Bank in hands of its receiver. The claim arose out of a draft on the Chatham

Manufacturing Company which was sent to the bank for collection. The company last named paid the draft by a check drawn against its deposit account with the bank, and the bank remitted for the collection by draft on one of its correspondents, but failed before this draft could be paid. There was, of course, no augmentation of the assets of the bank as a result of the collection, but merely a shifting of credits, and consequently no basis for the declaration of a trust. *Lifsey v. Goodyear Tire & Rubber Co.* (C. C. A. 4th) 67 Fed. (2d) 82, 83; *Ellerbe v. Studebaker Corporation of America* (C. C. A. 4th) 21 Fed. (2d) 993, 995; *Larabee Flour Mills v. First Nat. Bank* (C. C. A. 8th) 13 Fed. (2d) 330, 331. The learned judge below was of opinion, however, that the assets of the bank were subjected to a lien to the amount of the collection by reason of the proviso appearing in Section 218 (c) (14) of the North Carolina Code of 1927.

Section 218 (c) of the North Carolina Code is composed of twenty-three subsections all of which relate to the liquidation of state banks. Subsection 14 thereof, which contains the proviso in question, is as follows:

"(14) Declaration of Dividends; Order of Preference in Distribution.—At any time after the expiration of the date fixed by the Chief State Bank Examiner, or the duly appointed agent, for the presentation of claims against the bank, and from time to time thereafter, the Corporation Commission, out of the funds in its hands, after the payment of expenses and priorities, may declare and pay dividends to the depositors and other creditors of such bank in the order now or hereafter provided by law; and a dividend shall be declared when and as often as the funds on hand subject to the payment of dividends shall be sufficient to pay ten (10) per centum of all claims entitled to share in such dividends. In paying dividends and calculating the same, all disputed claims and deposits shall be taken into account but no dividend shall be paid upon such disputed claims and deposits until the same shall have been finally determined. The following shall be the order and preference in the distribution of the assets of any bank liquidated hereunder: (1) Taxes and fees due the Corporation Commission for examination or other services; (2) wages and salaries due officers and employees of the bank, for a period of not more than four months; (3) expenses of liquidation;

(4) certified checks and cashier's checks in the hands of a third party as a holder for value and amounts due on collections made and unremitted for or for which final actual payment has not been made by the bank; (5) amounts due creditors other than stockholders. The word 'asset' used herein shall not be deemed to include bailments or other property to which such bank has no title. Provided, that when any bank, or any officer, clerk, or agent thereof, receives by mail, express or otherwise, a check, bill of exchange, order to remit, note, or draft for collection, with request that remittance be made therefor, the charging of such item to the account of the drawer, acceptor, indorser, or maker thereof, or collecting any such item from any bank or other party, and failing to remit therefor, or the nonpayment of a check sent in payment therefor, shall create a lien in favor of the owner of such item on the assets of such bank making the collection, and shall attach from the date of the charge, entry or collection of any such funds. A statement of all dividends paid shall be filed in the office of the clerk of the Superior Court in the pending action, and said statements shall show the expenses deducted and the disputed claims and deposits considered in determining said dividend."

It is clear, we think, that even if this proviso be construed as having relation to solvent banks as distinguished from those in liquidation, it cannot affect national banks. It has been held that these banks have no power to pledge their assets to secure a private deposit (*Texas Pac. Ry. Co. v. Pottorff*, 291 U. S. 245, 253); and one of the reasons for this holding is that to permit such pledge would be inconsistent with many provisions of the national bank act which are designed to insure a ratable distribution of assets among creditors. The same reasoning would forbid the creation of a lien on assets as security for funds collected. And, of course, if the creation of such a lien be beyond the powers of the bank, it could not be created by act of the state legislature; for the legislature could not provide that action on the part of the bank should give rise to a lien which the bank, by reason of the limitations imposed upon it by act of Congress, was powerless to create.

But it is clear that the statute in question was not intended to have application to solvent banks. Quite apart from the fact that it is a proviso to one of the sub-sections of a statute dealing with the liquidation of insolvent banks,

it appears that it can have no practical application except in connection with their liquidation. The lien created, although it is to attach from the date of the charge, entry or collection, arises only upon "failing to remit" or "the non-payment of a check sent in payment"; and it is manifest that a solvent bank will not fail to remit collections or permit a check sent in payment of a collection to remain unpaid. It is only in case of banks which have failed, therefore, that the statute can have any practical application; and the lien which it creates is of such a character that it can be enforced only by a liquidation of the bank. See *Lewis v. Fidelity & Deposit Co.*, 292 U. S. 559 at 563 and 567. The statute must be construed, therefore, as relating to the distribution of assets in the hands of banks which have failed; for "in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect." *Collins v. New Hampshire*, 171 U. S. 30, 34; *Morgan v. Louisiana*, 118 U. S. 455, 462; *Henderson et al. v. Mayor of New York*, 92 U. S. 259, 268. So construed, it can have no application to the assets of national banks; for the national banking act provides how the assets of insolvent national banks shall be distributed. 12 U. S. C. A. 194. And it is well settled that state statutes cannot affect this distribution. *Davis v. Elmira Savings Bank*, 161 U. S. 275; *Easton v. State of Iowa*, 188 U. S. 220; *Old Company's Lehigh v. Meeker* (C. C. A. 2d), 71 Fed. (2d) 280; *Fiman v. South Dakota* (C. C. A. 8th), 29 Fed. (2d) 776, 777; *First Nat. Bank of Chicago v. Selden* (C. C. A. 7th), 120 Fed. 212.

The case of *Lewis v. Fidelity & Deposit Co.*, 292 U. S. 559, relied upon by appellee, is in reality an authority against its position. In that case a statute of Georgia, creating a general lien on the assets of banks as security for deposits of state funds, was held to have application to a national bank merely because the act of Congress of June 25, 1930, c. 604, 46 Stat. 809, 12 U. S. C. A. 90, authorized a national bank to give security for a deposit of public funds of the same kind as authorized by state law for state banking institutions. The Supreme Court said that no lien under the Georgia statute arose in 1928 when the deposit was made, and that the judgment of the court below sustaining the lien would have been reversed but for the enactment by Congress of the Act of 1930. See p. 564. Here

there is no act of Congress authorizing the creation of a lien on the assets of a national bank as security for collections; and the act of the North Carolina legislature can no more create a lien on the assets of a national bank than could the Georgia statute without the aid of the act of 1930.

We do not interpret the proviso as having been intended to make the collecting bank the agent of the holder of the item sent for collection, which was the purpose of the sections of the uniform bank collection code under consideration in *National Bank of America v. U. S. F. & G. Co.* (C. C. A. 7th), 71 Fed. (2d) 618, 619, and *Old Company's Lehigh v. Meeker, supra.* Nevertheless, under the rule recognized in this Circuit, the bank here was the agent of the owner of the draft for the purpose of making the collection and remitting the proceeds. *Ellerbe v. Studebaker Corporation* (C. C. A. 4th), 21 Fed. (2d), 993, 994; *Lifsey v. Goodyear Tire & Rubber Co.* (C. C. A. 4th), 67 Fed. (2d) 82, 83. But under the authority of these cases, appellee is not entitled to have a trust declared or to receive preferential payment from the assets in the hands of the receiver, since it has failed to show that these assets have been augmented as a result of the collections.

For the reasons stated, the decree appealed from will be reversed.

*Reversed.*

Excerpts from the Article entitled "The Bank Collection Code of the American Bankers Association" by Wayne L. Townsend, Professor of Law, Western Reserve University, Tulane Law Review, April 1934:

Page 378:

"As Sections 2 to 10 inclusive of the Code overthrow much of the existing law of bank collections, and as Sections 4, 11 and 12 tinker with, disrupt and repeal a considerable portion of the law of bills and notes, so does Section 13 invade the field of insolvency administration and arbitrarily create a class of preferred creditors without reference to existing principles and in plain disregard of equitable doctrine and all considerations of fairness. While the first group of sections allocates collection losses arising in the collection system, as between bank and depositor, to the depositor, and although the second group (Sections 11 and 12) affords a means whereby the risks can be imposed on makers, drawers and indorsers, the present Section 13 erects a scheme by the use of which such risks and losses can be further shifted and be made to repose on the depositors (and other general creditors) of an insolvent bank, who thus become the ultimate 'goats' of the Code.

Pages 388 to 392:

It is then self-evident that 'a trust creditor merely as such has no preference over others.'[153] in the administration of an insolvent's estate. In ability to point out any asset in the possession of the insolvent as the product of the misapplied property precludes the possibility of a decree for restitution in specie.[154] Although this principle of fairness in insolvency administrat on

[153] Webb v. Newhall, 274 Pa. 135, 117 Atl. 793 (1922).

[154] "The so-called right to be preferred in case of wrongful conversion is a right of ownership—a right of property. * * * When the means of ascertainment of the identity of property or proceeds fail, the right fails." Multnomah County v. Oregon Nat. Bank, 61 Fed. 912 (C. C. Ore. 1894). "The equitable right to trace the trust fund and impress the fund with which it has been commingled or the property into which it has been merged, with the trust, is rested upon the right of property and not on a theory of preference arising from an unlawful conversion." Hanover Nat. Bank v. Thomas, 217 Ala. 494, 117 So. 42 (1928).

has had its most important applications since the decision in Knatchbull v. Hallett, 13 Ch. D. 696 (1880)[155] it has been developed by courts of equity over a long period of time.[156] But the framers of the present Code in creating the trusts of Section 13 in favor of the owners of collection items have ignored every equitable consideration and every canon of fairness which has been developed by the course of decision. Both subdivisions expressly provide for trusts extending to all the assets of an insolvent bank, without regard to the question of whether the proceeds of the item are among the bank's assets or not. In Subdivision (2), the trust is established regardless of the receipt or non-receipt by the bank of anything in substitution for the collection item. The necessity of showing that the claimant has some equitable right to or claim upon some of the bank's assets is eliminated completely. The equitable basis of preferences is wiped out and in substitution we find an arbitrary statutory fiat that a preference shall be granted under the recited circumstances for no apparent reason whatever.

Subdivision (3) is brought into operation once an intermediate collecting bank has received the proceeds of an item in any form. The situation remains unaffected by the fact that it may be shown that at the time the bank closed such proceeds had been fully dissipated or lost and never came into the hands of the liquidator.[157]. Such an imposition of trust and granting of preference cannot be condoned whether it flow from a statute or a court's lack of understanding. Under such circumstances the owner of a collection item, not settled for, has no more equitable claim upon the bank's real estate, its posting machines, its note case, its cash on hand, than has an ordinary general depositor. None of these assets bears any particular relation to the dissipated proceeds of his misappropriated property.

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[155] 13 Ch. D. 696 (1880).

[156] See Ryall v. Ryall, 1 Atk. 59 (1739).

[157] E. g., see Sanders v. Stevens, 51 F. (2nd) 743 (D. C. Miss. 1931); Dickson v. First National Bank, 26 Fed. (2nd) 411 (C. C. A. 8th 1928); Leach v. Iowa State Savings Bank, 204 Iowa 497, 212 N. W. 748 (1927); State v. Farmers State Bank, 54 Mont. 515, 172 Pac. 130 (1918); Shaw v. Lamar County, 12 S. W. (2nd) 607 (Tex. Civ. App. 1928); Titlow v. McCormick. City Bank v. Blackmore, Salem Elev. Works v. Comm., Groff v. City Savings Fd. & Tr. Co., Farmers State Bank v. Smith, all *supra* note 150.

Why then should they be devoted to making the owner of the collection item whole before depositors of the bank receive any portion of them?

Under Subdivision (2) the mere charge of the drawer's check against his account with the drawee creates the trust in all the assets of the drawee, provided the privilege of Section 11 has not been exercised. A question at once presents itself to one who gives the situation a second's thought: How has the estate of the drawee been affected by such a charge? What assets does the bank now have which it did not have before the charge? Does the bank possess an asset to which anyone, in an attitude of fairness, can say that a trust attaches? If the check is discharged the bank has of course, diminished its total indebtedness. But a diminution of indebtedness is not an increase of assets.[158] The decisions are in conflict as to the existence of a trust in the situation covered by Subdivision (2).[159] Very clearly the drawee bank has received nothing by way of addition to its assets as a result of charging the check. There was no asset upon which the owner of the collection item had any claim before the account was charged. It is difficult to see how his relations to the assets of the bank, and to its cash in particular,[160]

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[158] "If it is affirmatively shown that the misappropriated trust funds have been dissipated without directly or indirectly augmenting the estate which has come into the hands of the trustee's assignee, probably no court would impress a trust or a lien upon the assets in favor of the beneficial owner of the misappropriated property. This would usually be the case where it is shown that the trust funds were used to pay debts of the trustee." Perry v. Trusts (7th ed. 1929) 1431. "The result of the cancellation of a debt is purely negative." Bogert, loc. cit. *infra*, note 165, at p. 559.

[159] Preference denied: Burnes National Bank, Spurway, 28 F. (2nd) 40 (D. C. Iowa 1928); Leach v. City-Comml. Sav. Bank, 207 Iowa 1254, 219 N. W. 496, 224 N. W. 583 (1928); People v. Merchants & Mech. Bank, 78 N. Y. 269 (1879); N. C. Corp. Comm. v. Mchts. & Farmers Bank, 137 N. C. 697, 50 S. E. 308 (1905); Shull v. Beasley, 149 Okl. 106, 299 Pac. 149 (1931); cf. Security Tr. & Sav. Bank v. Button, 7 Pac. (2nd) 245 (1932). Preference granted: Griffith v. Burlington State Bank, 128 Kan. 279, 277 Pac. 42 (1929); State v. Nebr. State Bank, 120 Neb. 539, 234 N. W. 82 (1931); Central Trust Co. v. Bank of Mullens, 108 W. Va. 12, 150 S. E. 137 (1929). And see Bank of Republic v. Republic State Bank, 42 S. W. (2nd) 27 (Mo. 1931); Federal Reserve Bank v. Peters, 139 Va. 45, 123 S. E. 379 (1924).

[160] Such trusts are usually alleged only against the cash on hand at time of closing on the ground that the transaction is equivalent to the bank segregating part of such cash in a separate fund, contemporaneously with charging the check to the drawer's account and for the purpose of securing the payment of same; or that charging the check is the same as cashing the check at one window and paying it back into the bank at another.

are any different after the charge. The proposition has been advanced that a bank's relation to its cash is changed from that of outright owner to that of trustee by debiting (or agreeing to debit) a depositor's account and promising to use funds debiting (or agreeing to debit) a depositor's account and promising to use funds in the amount of the debit for specified purposes of the depositor.[161] The quietus was placed upon any such doctrine at least for the Federal courts, by the Supreme Court in Blakey v. Brinson,[162] where it is stated that 'The cancellation of the credit balance by the debit neither suggests any intention to establish a trust nor points to any identifiable thing which could be the subject of it". How, then, accord any greater efficiency in the establishing of a trust res to the bank's charge of a collection item to the drawer's account? But Subdivision (2) establishes a trust in such a case which not only covers that against which a trust is usually asserted, cash on hand, but extends to all the assets of the failed bank. Neither reason nor previous authority gives any sound basis for the creation of the statutory trust in such a case.[163]

The provisions of the Code shift the incidence of risk successively from one class of bank-related persons to another. As between owner of a collection item and a collecting bank, losses are in general allocated to the owner, where they no doubt properly belong. Next, the risk is shifted to parties to an instrument and away from the owner (Section 11), a solution the desirability of which is much more uncertain. Finally, the burden of losses may be made to rest ultimately upon the general depositors of a failed bank, an imposition which is indefensible. What has impelled the framers

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[161] Davis v. McNair, 48 Fed. (2nd) 494 (C. C. A. 5th 1931). And see Fagan v. Whidden, 57 Fed. (2nd) 631, 632 (C. C. A. 5th, 1932). Contra; Mark v. Westlin, 48 Fed. (2nd) 609 (D. C. Minn. 1931). See dicta in City of Miami v. First Nat. Bank, 58 Fed. (2nd) 561 (C. C. A. 5th 1932), considered in Comment, 6 Tulane L. Rev. 643 (1932).

[162] 286 U. S. 254, 52 Sup. Ct. 516 (1932).

[163] Louisiana Act 63 of 1926, Sec. 2, accords a privilege to a forwarder-bank under the conditions of Subdivision (2), where the drawee also issues a draft in settlement. The criticism of the writer must extend to those legislative acts, other than the Code presently considered, which on the whole give a claimant the same position as does Subdivision (3). See Ga. Ann. Code (Michie Supp. 1928) Sec. 2366 (70); La. Act 63 of 1926, Sec. 1; Throckmorten's Ann. Code of Ohio, Sec. 712, 713, 714.

of the Code to provide so well for the mulcting of ordinary bank creditors? No explanation is forthcoming except the statement in the draftsman's Explanatory Notes that "the purpose of this section is to establish uniform rules based on the better reasoned decisions." The impertinence of such an assumption makes any commentary unnecessary. But it might be to the point to ask whether the fact that depositors are a non-cohesive group whose interests are represented always by a liquidator not especially enthusiastic about his duty of opposing specific preference claimants has affected the draftsman in the decision to force burdens upon a relatively unresisting class as it has affected courts desirous of avoiding the mental strain of thinking the matter through? It is such an easy solution of what appears otherwise to be a difficult problem.

It has been suggested that the owners of collection items have some vague "equity" to be treated differently than ordinary depositors, even though they cannot show that the insolvent bank has improved its asset position by the use of their items, because some risks have by statute or contractual agreement been placed upon such owners in their relations with others. Why such a change in the allocation of risk as between owner and the forwarding bank ought to affect the rights of general creditors, the writer cannot understand. The matter has been treated in a previous volume of this Review and repetition seems unnecessary.[164] Professor Bogert has classified the policy bases upon which statutory preferences have usually been founded, apart from the conventional express or constructive trust concept.[165] None of such policy considerations are present in the situations comprehended

[164] See Comment, 6 Tulane L. Rev. 657-659 (1932).

[165] Preferred debts are usually created by statute in the administration of the estates of deceased persons, insolvents, and the like, for one of four reasons, namely: (1) to care for the expenses of the administration of the estate; (2) to satisfy governmental claims; (3) to pay persons who have rendered particularly meritorious services or have particularly meritorious claims, as in the case of funeral expenses, expenses of the last illness, or claims of a widow or children; and (4) to secure payment to those in a low economic position as, for example, laborers, household servants and the like. It would not seem that the depositor of the item for collection deserves preference on any of these grounds." Bogert, Failed Banks, Collection Items, and Trust Preferences, 29 Mich. L. Rev. 545, 564 (1931). As to other suggestions re the allocation of collection risks, see same article.

by Section 13. Why, then, by a process of statutory attrition waste away the insolvent estate from which the ordinary depositor will in any event obtain such slight satisfaction?

Section 13 would be sufficient to damn the Code as a whole, even though it possessed no other defects. But the Code contains so little that can be favorably commented on that this little is lost in the overwhelming crush of the unjustified. Further than those portions which place collection risks upon the owners of collection items, approval cannot go. The attempt to disrupt the law of negotiable instruments looks to effects which should be avoided—radical and unnecessary changes in a fairly well settled field (presentment and notice of dishonor) and the substitution of rules whose most outstanding characteristics are unintelligible definition and lack of circumscription (Sections 11 and 12) No reasons whatsoever are advanced to show that th law of change of position in the quasi-contracts ar agency fields does not work justice; nor is any justif cation attempted for the existence of one rule relating to change of position in the bank collection cases and a different rule in other agency situations. The repeated use of terms which have no definition of any kind in the Code and which have only a vague meaning for both layman and lawyer can scarcely be expected to develop the substantive law in a uniform manner. To climax the comedy of errors, Section 13 distributes preferences on arbitrary factual bases which have no more relation to the equities of an insolvency situation than had the fecundity of Henriette D'Entragues to the welfare of the state."

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# SUPREME COURT OF THE UNITED STATES.

No. 340.—October Term, 1934.

Old Company's Lehigh, Inc., Petitioner, *vs.* Henry E. Meeker, as Receiver for the First National Bank in Mamaroneck, et al., Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 4, 1935.]

Mr. Justice Cardozo delivered the opinion of the Court.

The controversy here, like the one in No. 338, decided herewith, grows out of an attempt by the owner of negotiable paper to impress a trust upon the assets of an insolvent national bank to which the paper had been forwarded for the purpose of collection.

The complaint, which is in three counts, is brought before us by a motion to dismiss, which is equivalent to a demurrer.

According to the first cause of action, plaintiff, a New Jersey corporation, the petitioner in this court, was the owner of a promissory note for $3,000, made by R. G. Brewer, Inc., to the order of the plaintiff, and payable on January 16, 1933, at the office of the First National Bank of Mamaroneck, a corporation organized under the national banking act. This note the plaintiff deposited on January 12, 1933, in a bank in Philadelphia, which forwarded it through other banks to the bank in Mamaroneck for collection from the maker. R. G. Brewer, Inc., the maker, had an account at the First National Bank of Mamaroneck with a credit balance on the books of the bank in excess of the amount owing on the note. On January 14, 1933, it delivered to the bank a check upon that account for $3,015, and received back the note, which was surrendered as paid. On January 16, 1933, the next business day, the Mamaroneck bank, being insolvent, was closed by the Comptroller of the Currency without remitting or accounting for any proceeds of collection. The plaintiff claims the benefit of a trust upon the assets in the hands of the receiver.

The second cause of action is the same as the first with these additional allegations: The bank in Mamaroneck knew itself to be insolvent on January 14, 1933, when the plaintiff's promissory note was accepted for collection. R. G. Brewer, Inc., whose treasurer (R. G. Brewer) was a director and managing officer of the bank, also knew of the insolvency and of the impending liquidation. What was done in the acceptance of the check and the surrender of the note two days before maturity was the product, so it is charged, of a conspiracy to release the Brewer corporation from liability and thus defraud the plaintiff.

The third cause of action goes upon the theory that the note was not discharged or canceled but is in the possession of the receiver, who should be directed to return it.

The Circuit Court of Appeals affirmed a judgment of dismissal as to the first and second causes of action, holding the plaintiff to be a general creditor without title to a preference. As to the third cause of action, the allegations were found sufficient on their face to put the parties to their proofs, and to that extent only the dismissal was reversed. 71 F. (2d) 280. A writ of certiorari brings the case here. The third cause of action is not before us, the receiver having acquiesced in the judgment of the court below. The causes of action to be considered are the first and second.

What was done by the Mamaroneck bank on January 14, 1933, did not involve in its doing the creation of a special deposit or an augmentation of the assets. What was done had no effect except to diminish liabilities by reducing the indebtedness due to a depositor. *Jennings* v. *United States Fidelity & Guaranty Co.*, February 4, 1935, — U. S. —. The petitioner insists that the transaction must be viewed as if Brewer, the depositor, had withdrawn $3,015 in coin or other currency, and had paid it back to the bank to apply upon the note. But that is not what happened. The bank, aware of its insolvency, might have been unwilling to pay out the coin, even if Brewer had demanded it, when the effect of the payment would have been to prefer one creditor over others. R. S. § 5242; 12 U. S. C. § 91; *National Security Bank* v. *Butler*, 129 U. S. 223; *McDonald* v. *Chemical National Bank*, 174 U. S. 610, 618; *Roberts* v. *Hill*, 24 Fed. 571. Brewer, equally aware of the insolvency, might have been unwilling to return the coin if once he held it in his grasp and had the power to retain it. More-

over, the note had not matured, and there was no duty to pay or to collect in advance of its maturity. We indulge in nothing more than guess work when we assume that the transaction would have been carried through at all if bank or depositor had insisted that it receive another form. Cf. *Hecker-Jones-Jewell Milling Co.* v. *Cosmopolitan Trust Co.*, 242 Mass. 181, 187. Form is closely knit to substance when a bank, at the end of its resources, is about to close its doors.

The argument is made that the agent for collection was guilty of a wrong in accepting payment through the medium of a check upon itself with knowledge at the time that insolvency was imminent. If this be so, the wrong does not avail to charge a trust upon the assets whereby the plaintiff will have a preference over the creditors at large. A cause of action for damages may exist, upon which the plaintiff, making proper proof, will be entitled to a dividend. There may also be a cause of action for the return of the canceled note, or for a dividend upon the value if return is found to be impossible. Liabilities such as these have their origin and measure in the loss suffered by the claimant, the owner of the paper transmitted for collection. They do not correspond to equivalent increments of value in the assets that are left in the hands of the receiver.

By an amendment of the Negotiable Instruments Law (Consolidated Laws of New York, c. 38; Article 19A, §§ 350 to 350 [1]), New York has adopted the Uniform Bank Collection Code, which has already been considered by this court in a case arising in Indiana. *Jennings* v. *United States Fidelity & Guaranty Co., supra.* Section 350(1) of the code is to the effect that in the event of insolvency a creditor in the situation of the plaintiff shall be entitled to a preference. As applied to a national bank the preference is unlawful. *Jennings* v. *United States Fidelity & Guaranty Co., supra.*

The decree should be affirmed, and

*It is so ordered.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*